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THE ASSAULT UPON THE CITADEL (STRICT LIABILITY TO THE CONSUMER)

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"THE assault upon the citadel of privity is proceeding in these days apace." So said Cardozo in 1931,[1] and has been much quoted since. With the passage of nearly thirty years, a goodly part of the citadel still holds out; but the assault goes on with unabated vigor. It is the purpose of this Article to inquire, how goes the battle, in one very important and more or less separate area of the fight, where the seller of chattels defends against the ultimate consumer, with whom he stands in no privity of contract.

One major bastion, that of negligence liability, has been carried long since, and its guns turned inward upon the defenders. Another, that of the strict liability of the seller of food and drink, is hard pressed and sore beset, and may even now be tottering to its fall. Elsewhere along the battlements there have been minor breaches made, but the defense is yet stout. War correspondents with the beleaguering army [2] are issuing daily bulletins, proclaiming that the siege is all but over. From within the walls comes the cry, not so; we have but begun to fight.[3] Watchman, what of the night?

The tale of the storming of the heights of negligence has been told too often for any need to repeat it here.[4] In 1842 Lord Abinger foresaw "the most

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1. Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

2. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952); McNiece & Thornton, *Is the Law of Negligence Obsolete?* 26 ST. JOHN'S L. REV. 255 (1952); James, *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293 (1958).

3. Peairs, *The God in the Machine*, 29 B.U.L. REV. 37 (1949); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

4. Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. REV. 343 (1929); Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925); Feezer, *Tort Liability of Manufacturers*, 19 MINN. L. REV. 752 (1935); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L.J. 388 (1933); Jeanblanc, *Manufacturers' Liability to Persons Other Then Their Immediate*

absurd and outrageous consequences, to which I can see no limit,"[5] if it should ever be held that the defendant who made a contract with *A* would be liable to *B* for his failure to perform that contract properly. What happened in the next century was enough to make the learned jurist turn in his grave. The courts began by the usual process of developing exceptions to the "general rule" of nonliability to persons not in privity. The most important of these was that the seller of a chattel owed to any one who might be expected to use it a duty of reasonable care to make it safe, provided that the chattel was "inherently" or "imminently" dangerous. In 1916 there came the phenomenon of the improvident Scot who squandered his gold upon a Buick, and so left his name forever imprinted upon the law of products liability. Cardozo, wielding a mighty axe, burst over the ramparts, and buried the general rule under the exception. "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[6]

During the suceeding years this decision swept the country, and with the barely possible but highly unlikely exceptions of Mississippi[7] and Virginia,[8] no American jurisdiction now refuses to accept it. The rule of the *MacPherson* case was extended by degrees. It was extended to property damage,[9] even when it was caused by chattels such as animal food which involved no recog-

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Vendees, 24 VA. L. REV. 134 (1937); James, *Products Liability*, 34 TEXAS L. REV. 192 (1955); Wilson, *Products Liability*, 43 CALIF. L. REV. 614, 809 (1955); Noel, *Products Liability of a Manufacturer in Tennessee*, 22 TENN. L. REV. 985 (1953).

The most comprehensive study of both negligence and strict liability, still valuable after nearly twenty years, is the Report of the New York Law Revision Commission on *Products Liability for Breach of Warranty and Negligence*, N.Y. LEG. DOC. No. 65, at 413-73 (1943), which was the work of Professor Ehrenzweig.

5. Winterbottom v. Wright, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (Exch. 1842).

6. MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

7. The last Mississippi holding rejected the *MacPherson* case. Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928). In E. I. du Pont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954), the court intimated, without deciding, that it might be accepted. In Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957), the federal court concluded that Mississippi would now accept the case.

8. The Supreme Court of Virginia has continued to avoid the issue, and leave open the question whether the "modern rule" will be applied in that state. Robey v. Richmond Coca-Cola Bottling Works, Inc., 192 Va. 192, 64 S.E.2d 723 (1951); H. M. Gleason & Co. v. International Harvester Co., 197 Va. 255, 88 S.E.2d 904 (1955). In Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951), the federal court concluded that Virginia has in reality adopted the rule.

9. Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (D. Me. 1947); United States Radiator Corp. v. Henderson, 68 F.2d 87 (10th Cir. 1933); Marsh Wood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, 263 N.Y. 463, 189 N.E. 551 (1934); C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W.2d 534 (Ky. 1956); Gosnell v. Zink, 325 P.2d 965 (Okla. 1958).

nizable risk of personal injury.[10] It was extended beyond the purchaser, to protect his employees [11] and the members of his family,[12] as well as subsequent purchasers [13] and other users of the chattel,[14] and casual bystanders [15] and others "in the vicinity of its probable use."[16] On the defendant's side it was extended to include makers of component parts [17] and assemblers of parts,[18] and those who put their names upon goods made by others,[19] and sellers who were not and did not purport to be manufacturers at all.[20] The rule has long since been extended to repairmen who do work on the chattel,[21]

10. Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952); Dunn v. Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (1954); Brown v. Bigelow, 325 Mass. 4, 88 N.E.2d 542 (1949); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929); Pine Grove Poultry Farm, Inc. v. Newtown By-Prods. Mfg. Co., 248 N.Y. 293, 162 N.E. 84 (1928).

11. Rosebrock v. General Elec. Co., 236 N.Y. 227, 140 N.E. 571 (1923); Marsh Wood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932) (dictum); Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481 (1934) (dictum); O'Donnell v. Geneva Metal Wheel Co., 183 F.2d 733 (6th Cir. 1950).

12. White Sewing Mach. Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 633 (1927); Baker v. Sears, Roebuck & Co., 16 F. Supp. 925 (S.D. Cal. 1936).

13. Beadles v. Servel, Inc., 344 Ill. App. 133, 100 N.E.2d 405 (1951); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915); State *ex rel.* Woodzell v. Garzell Plastics Indus., Inc., 152 F. Supp. 483 (E.D. Mich. 1957).

14. Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E.2d 415 (1936); Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N.E.2d 714 (1937); Reed & Barton Corp. v. Maas, 73 F.2d 359 (1st Cir. 1934); Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 195 N.W. 388 (1923).

15. McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927); Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) (dictum); Hopper v. Charles Cooper & Co., 104 N.J.L. 93, 139 Atl. 19 (Ct. of Err. & App. 1927).

16. RESTATEMENT, TORTS § 395; Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1954); Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); Whitehead v. Republic Gear Co., 102 F.2d 84 (9th Cir. 1939) (dictum); Ford Motor Co. v. Zahn, 265 F.2d 729 (8th Cir. 1959).

17. Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932); Spencer v. Madsen, 142 F.2d 820 (10th Cir. 1944); State *ex rel.* Woodzell v. Garzell Plastics Indus., Inc., 152 F. Supp. 483 (E.D. Mich. 1957).

18. Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942).

19. Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932); Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935); Armour & Co. v. Leasure, 177 Md. 393, 9 A.2d 572 (1939); Swift & Co. v. Blackwell, 84 F.2d 130 (4th Cir. 1936); Slavin v. Francis H. Leggett & Co., 114 N.J.L. 421, 177 Atl. 120 (Sup. Ct. 1935), *aff'd per curiam*, 117 N.J.L. 101, 186 Atl. 832 (Ct. Err. & App. 1936).

20. Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1954); see Bock v. Truck & Tractor, Inc., 18 Wash. 2d 458, 139 P.2d 706 (1943); Jones v. Raney Chevrolet Co., 217 N.C. 693, 9 S.E.2d 395 (1940).

21. Hudson v. Moonier, 94 F.2d 132 (8th Cir. 1938), *aff'd*, 102 F.2d 96 (8th Cir. 1939); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 657 (1933); Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932); Vrooman v. Beech

and, in many states, to building contractors.[22] It has become, in short, a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel.[23]

Only two small islands of resistance continue to hold out, in subterranean chambers. New York[24] and three or four other courts[25] still talk the language of "inherent danger," and refuse to find liability for normally harmless and inoffensive objects, such as a bed, or a can with a key. It is by no means clear, however, that these decisions mean to say more than that, upon the facts of the particular case, no harm could reasonably be expected to result, and there was simply no negligence. These same courts, in other cases, have upheld liability without privity for objects normally very innocuous.[26] There

Aircraft Corp., 183 F.2d 479 (10th Cir. 1950); Fish v. Kirlin-Gray Elec. Co., 18 S.D. 122, 99 N.W. 1092 (1904); Williams v. Charles Stores Co., 209 N.C. 591, 184 S.E. 496 (1936).

22. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948); Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Hunter v. Quality Homes, Inc., 45 Del. (6 Terry) 100, 68 A.2d 620 (Del. 1949); Colton v. Foulkes, 259 Wis. 142, 47 N.W.2d 901 (1951); Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928); Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932); McDonnell v. Wasenmiller, 74 F.2d 320 (8th Cir. 1934).

23. Gratuitous lenders, bailors and donors are, however, still held to have no duty of inspection before delivery of the chattel, and are liable only for a failure to disclose defects of which they have knowledge, which may make it dangerous to third persons. Gagnon v. Dana, 69 N.H. 264, 39 Atl. 982 (1898); Johnson v. H. M. Bullard Co., 95 Conn. 251, 111 Atl. 70 (1920); The Pegeen, 14 F. Supp. 748 (S.D. Cal. 1936); Davis v. Sanderman, 225 Iowa 1001, 282 N.W. 717 (1938); Ruth v. Hutchinson Gas Co., 209 Minn. 248, 296 N.W. 136 (1941); Nelson v. Fruehauf Trailer Co., 20 N.J. Super. 198, 89 A.2d 445 (App. Div. 1952).

24. Field v. Empire Case Goods Co., 179 App. Div. 253, 166 N.Y. Supp. 509 (1917) (bed); Jaroniec v. C. O. Hasselbarth, Inc., 223 App. Div. 182, 228 N.Y. Supp. 302 (1928) (bed); Timpson v. Marshall, Meadows & Stewart, Inc., 198 Misc. 1034, 101 N.Y.S.2d 583 (Sup. Ct. 1950) (shoes); Liedeker v. Sears, Roebuck & Co., 249 App. Div. 835, 292 N.Y. Supp. 541 (1937) (beach chair); Boyd v. American Can Co., 249 App. Div. 644, 291 N.Y. Supp. 205 (1936), *aff'd per curiam*, 274 N.Y. 526, 10 N.E.2d 532 (1937) (can with key); Block v. Liggett & Myers Tobacco Co., 162 Misc. 325, 296 N.Y. Supp. 922 (Sup. Ct. 1937) (per curiam) (cigarette).

25. Poplar v. Bourjois, Inc., 272 App. Div. 74, 69 N.Y.S.2d 252 (1947), *aff'd*, 298 N.Y. 62, 80 N.E.2d 334 (1948) (cosmetic container: Maryland law); Osheroff v. Rhodes-Burford Co., 203 Ky. 408, 262 S.W. 583 (1924) (hook of a swing); Davis v. Glass Coffee Brewer Corp., 236 Ky. 706, 178 S.W.2d 407 (1944) (coffee percolator); Robbins v. Georgia Power Co., 47 Ga. App. 517, 171 S.E. 218 (1933) (vibrator); Schindley v. Allen-Sherman-Hoff Co., 157 F.2d 102 (6th Cir. 1946) (gate stop: Ohio law); Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951) (vaporizer); Defore v. Bourjois, Inc., 268 Ala. 211, 105 So. 2d 846 (1958) (perfume bottle).

26. Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E.2d 415 (1936) (per curiam) (coffee urn); Meditz v. Liggett & Myers Tobacco Co., 167 Misc. 176, 3 N.Y.S.2d 357 (N.Y.C. City Ct. 1938) (cigarette); Workstel v. Stern Bros., 3 Misc. 2d 858, 156 N.Y.S.2d 335 (Sup. Ct. 1956) (bed); La Frumento v. Kotex Co., 131 Misc. 314, 226 N.Y. Supp. 750 (N.Y.C. City Ct. 1928) (sanitary napkin); White Sewing Mach. Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 633 (1927) (sewing machine); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947) (sofa); *cf.* Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (lounge chair).

is, in addition, still a refusal on the part of a few courts to allow recovery for pecuniary loss to the consumer caused by the defects in the product itself, such as the cost of repairing it when it breaks down.[27] This very evidently results from a reluctance, not to find liability for negligence, but to extend it to the protection of such purely economic interests.[28] Apart from these few cases, no one now seriously disputes the broad general rule that the seller of a chattel is always liable for his negligence.

At a comparatively early stage of the battle over negligence, and while it was still hanging in the balance, the assault began upon another wing, against the fortress of strict liability. In the beginning it was directed against a narrow segment of the wall, defended only by the sellers of food and drink.

Food and Drink

The purveyor of victuals for human consumption always has been held to a special responsibility under the common law. Even in the ancient days of the courts of custom, manor and baron, leet and tolsey and pie-powder, there were innumerable local regulations governing weight and measure and quality. The baker of bad bread went to the pillory, and the ale-wife who sold sorry beer "journeyed to the tumbrel with distaff and spindle."[29] The year 1266 saw the first of a series of English criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and others who marketed "corrupt" food and drink for immediate consumption. Although these statutes said nothing about civil liability, it was recognized that "by the common custom of the realm" there was a general principle that those who failed to show the degree of skill prevailing in their trade were subject to liability in an action on the case.[30]

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27. Trans-World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955); Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (Dist. Ct. App. 1956); A. J. P. Contracting Corp. v. Brooklyn Builders Supply Co., 171 Misc. 157, 11 N.Y.S.2d 662 (1939), *aff'd mem.*, 258 App. Div. 747, 15 N.Y.S.2d 424 (1939), *aff'd per curiam*, 283 N.Y. 692, 28 N.E.2d 412 (1940); Lucette Originals, Inc. v. General Cotton Converters, Inc., 8 App. Div. 2d 102, 185 N.Y.S.2d 854 (1959).

Where there is physical damage to the chattel itself, as where an automobile is wrecked because of its bad brakes, recovery is allowed. Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915); International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W.2d 534 (Ky. 1956); Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (Super. Ct., App. Dep't 1958). The last named case overrules Judson Pacific-Murphy, Inc. v. Thew Shovel Co., 127 Cal. App. 2d 828, 275 P.2d 841 (Super. Ct., App. Dep't 1954), where a crane was used for the "entirely laudable work of raising steel for the building of the Hastings College of Law."

28. *Cf.* Karl's Shoe Stores v. United Shoe Mach. Corp., 145 F. Supp. 376 (D. Mass. 1956) (denying recovery to a retailer for his pecuniary loss). See generally Seavey, *Actions for Economic Harm—A Comment*, 32 N.Y.U.L. Rev. 1242 (1957).

29. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133, 1143 (1931).

30. Melick, The Sale of Food and Drink 1, 7 (1936).

Beginning about 1431, there were dicta in a line of decisions,[31] and occasional statements of text writers,[32] to the effect that the seller of food incurred a strict liability, in the nature of an implied warranty. After the ancient statutes had been repealed in 1844,[33] Baron Parke said by way of dictum in *Burnby v. Bollett*,[34] where one farmer sold a pig to another, that sellers of corrupt victuals were responsible civilly to those to whom they sold them, "certainly if they do so knowingly, and probably if they do not." There has been some difference of opinion as to whether all of this adds up to a special common-law warranty peculiar to food.[35] Some kind of special responsibility there undoubtedly was; and whether it was to be called "warranty" is perhaps of little consequence today.[36] The early American decisions thought that "warranty" was the name for it, and imposed strict liability upon the seller of food, in favor of his purchaser, as "a principle, not only salutary, but necessary to the preservation of health and life."[37]

All of this involved only direct sales to the injured consumer. The extension of the strict liability to third persons with whom the seller had made no contract came after the turn of the century. It was the aftermath of a prolonged and violent national agitation over defective food,[38] which at times

31. Y.B. 9 Hen. VI, f. 53B, pl. 37 (1431); Y.B. 11 Edw. IV, f. 6B, pl. 10; Keilwey 91 note, 72 Eng. Rep. 254 note (K.B. 1507); Roswel v. Vaughan, Cro. Jac. 196, 79 Eng. Rep. 171 (Exch. 1607).

32. Haley, annot., in FITZ-HERBERT, NATURA BREVIUM 94 (9th ed. 1794); 3 BL. COM. 165 (1765); see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 386 (4th ed. 1936).

33. 7 & 8 Vict., 1849, c. 24.

34. 16 M. & W. 644, 654, 153 Eng. Rep. 1348, 1352 (Exch. 1847).

35. MELICK, THE SALE OF FOOD AND DRINK 10 (1936), concludes that there was an implied warranty. Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 8-9 (1919), considers that there was not, relying in the main upon Emmerton v. Mathews, 7 H. & N. 586, 158 Eng. Rep. 604 (1862), and Smith v. Baker, 40 L.T.R. (n.s.) 261 (1878), where, however, the sale was to a dealer and not to a consumer.

36. Some kind of special civil responsibility undoubtedly attached to retail food sales long before the modern warranties expressed by the sales statutes were developed, and this responsibility ultimately came to be classed as a 'warranty' obligation. But whether it presupposed *scienter*, and whether it was simply absorbed into the warranties of fitness and merchantability, atrophied from disuse, died with the repeal of the ancient food statutes in 1844, or survived in legal potentiality until snuffed out [by the English Sale of Goods Act] in 1894, we cannot be sure. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 26 (1951).

37. Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815); Moses v. Mead, 1 Denio 378, 387, 43 Am. Dec. 676 (N.Y. 1845); Race v. Krum, 222 N.Y. 410, 118 N.E. 853 (1918). See Heinemann v. Barfield, 136 Ark. 500, 502, 207 S.W. 62 (1918); Hoover v. Peters, 18 Mich. 51, 55 (1869); Bark v. Dixson, 115 Minn. 172, 131 N.W. 1078 (1911) (master-servant); McNaughton v. Joy, 1 W.N.C. 470 (Pa. 1875); Flessher v. Carstens Packing Co., 93 Wash. 48, 54, 160 Pac. 14, 17 (1916); Jones v. Murray, 3 T.B. Mon. 83, 85 (Ky. 1825); Osgood v. Lewis, 2 Harr. & G. 495, 519 (Md. 1829); Bragg v. Morrill, 49 Vt. 45, 24 Am. Rep. 102, 103 (1876) (dictum); Williams v. Slaughter, 3 Wis. 347, 360 (1854) (dictum).

38. Narrated in Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROB. 3 (1933).

almost reached a pitch of hysteria. This was the age of the "muckrakers," who uncovered and revealed to a dismayed public the fact that a major part of the food which it consumed daily was adulterated and preserved with poisonous chemicals,[39] or was unsanitary and dangerously unsafe. Dr. Harvey W. Wiley, Chief Chemist of the Department of Agriculture, and his "poison squad," contributed wholesale proof. The meat industry came under particular attack; and a sensational novel, *The Jungle*, by Upton Sinclair, depicted conditions in the Chicago packing houses as filthy, slimy, revolting and horrible beyond belief. They were in all conscience bad enough, but the portrayal in this novel strains credulity today.[40] It was the best selling book of the

39. Scores of articles appeared in 1905 and 1906 which dealt with the patent medicine evil and the adulteration of food. Even Senator McCumber of North Dakota had an article in the *Independent* which was entitled "The Alarming Adulteration of Food and Drugs." In it he presented many facts which Professor E. F. Ladd, the Food Commissioner of his own state, had discovered. Ladd had never yet found a can of potted chicken or potted turkey in North Dakota which contained chicken or turkey in determinable quantities. Of the local markets of his state, ninety per cent used chemical preservatives. The amount of borax or boracic acid which was used in sausages and hamburger steak ranged from twenty to forty-five grains per pound though the daily medical dose was only from five to nine grains . . . . Boracic acid or borates were common ingredients of dried beef, smoked meats, canned bacon, and canned chipped beef. Ninety per cent of the so-called French peas were found to contain copper salts, and some contained aluminum salts in addition. Only one kind of catsup was free from chemical preservatives and coal tar coloring matters. About seventy per cent of cocoas and chocolates were adulterated, and glucose served a great variety of purposes. More than ten times the amount of Vermont maple syrup was sold every year than the state could produce. A large proportion of ground spices were imitations. Jellies, wines, and other liquors were made from cheap substances and then doctored up. Butter was a mixture of butter and deodorized lard. Ice cream contained no cream, only condensed milk and neutral lard. Cider vinegar usually contained no apple juice. Drugs were adulterated and misbranded in a similar fashion, often with deplorable consequences.

Id. at 7-8.

40. After rereading *The Jungle*, the writer cannot refrain from expressing his opinion as to how bad a piece of literature it is. As to style, characterization, plot, incident, dialogue, everything, in short, beyond the subject with which it deals, the book is trash. Mr. Dooley's description is a fair one:

> A young fellow wrote a book. Th' divvle take him f'r writin' it. Hogan says it's a grand book. It's wan iv th' gr-reatest books he iver r-read. It almost made him commit suicide. Th' hero is a Lithuanian, or as ye might say, Pollacky, who left th' barb'rous land iv his birth an' come to this home iv opporchunity where ivry man is th' equal iv ivry other man befure th' law if he isn't careful. Our hero got a fancy job poling food products out iv a catchbasin, an' was promoted to scrapin' pure leaf-lard off th' flure iv th' glue facthry. But th' binifits iv our gloryous civilyzation were wasted on this poor peasant. Instead iv bein' thankful f'r what he got, an' lookin' forward to a day whin his opporchunity wud arrive an', be merely stubbin' his toe, he might become rich an' famous as a pop'lar soup, he grew cross an' unruly, bit his boss, an' was sint to jail. But it all tur-rned out well in th' end. Th' villain fell into a lard-tank an' was not seen again ontil he tur-rned up at a fash'nable resthrant in New York. Our hero got out iv jail an' was rewarded with

year, was translated into seventeen languages, and by 1922 had sold 150,000 copies. Intended as a piece of propaganda for socialism, *The Jungle* succeeded in becoming instead a minor *Uncle Tom's Cabin* of the war against bad food. The author said later that he had aimed at the public's heart, and by accident hit it in the stomach.[41]

The upshot of the agitation was the Federal Food and Drug Act of 1906, which closed interstate commerce to misbranded and adulterated food and drugs. It was preceded and followed by numerous state food and drug acts, many of them with more teeth than the federal law. Hard upon the heels of all this came the political overturn of 1912, when conservative politicians went down to defeat all along the line across the country, and a new crop of legislators, as well as many new judges, took office with the philosophy that the public must be protected against "big business." The time and public sentiment were ripe for a change in the law of food liability.

The state of Washington [42] led off in 1913, to be followed within the year by Kansas [43] and Mississippi.[44] None of the three decisions gave much in the way of reasons for the strict liability to the consumer without privity, other than the protection of the public interest, and an "implied representation" that the food was safe. As other jurisdictions followed suit, and the cases began to multiply, there was a period in the twenties in which the courts labored hard to evolve a great many highly ingenious theories [45] to justify the rule, such as fictitious agencies or third-party-beneficiary contracts. In 1927 the Mississippi court [46] came up with the idea of a "warranty" running with the goods from the manufacturer to the consumer, by analogy to a covenant running with the land. This found general, although perhaps undeserved, acceptance, and nearly all of the later cases have adopted some theory of "warranty."

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a pleasant position as a porter iv an arnychist hotel, an' all ended merry as a fun'ral bell.

DUNNE, MR. DOOLEY: NOW AND FOREVER 236 (Academic Reprints, Stanford, Cal. 1954).

41. Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROB. 3, 8 (1933).

42. Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

43. Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914).

44. Jackson Coca Cola Bottling Co. v. Chapman, 106 Miss. 864, 869, 64 So. 791 (1914):

> A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin', tim'rous beastie' drowned in a bottle of coca-cola .... [The consumer] did not get joy from the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:
>
> 'The best-laid schemes o' mice an' men
> Gang aft aglay
> An' lea'e us nought but grief an' pain,
> For promis'd joy!'

Id. at 869, 64 So. at 791.

45. See text at notes 144-46 *infra*.

46. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

The gradual process of acceptance of the strict liability rule in food cases continued, and in recent years has accelerated. As of the present writing, there are seventeen jurisdictions which apply it. They are Arizona,[47] California,[48] Florida,[49] Illinois,[50] Iowa,[51] Kansas,[52] Louisiana,[53] Michigan,[54] Mississippi,[55] Missouri,[56] Ohio,[57] Oklahoma,[58] Pennsylvania,[59] Puerto Rico,[60]

47. Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); see Eisenbeiss v. Payne, 42 Ariz. 262, 25 P.2d 162 (1933).

48. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Vaccarezza v. Sanguinetti, 71 Cal. App. 2d 687, 163 P.2d 470 (Dist. Ct. App. 1945); Medeiros v. Coca-Cola Bottling Co., 57 Cal. App. 2d 707, 135 P.2d 676 (Dist. Ct. App. 1943).

49. Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944); Florida Coca-Cola Bottling Co. v. Jordan, 62 So. 2d 910 (Fla. 1953); see Parkinson & Sanders, *Implied Warranty in Florida*, 12 U. FLA. L. REV. 241 (1959).

50. Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Blarjeske v. Thompson's Restaurant Co., 325 Ill. App. 189, 59 N.E.2d 320 (1945); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943); Williams v. Paducah Coca Cola Bottling Co., 343 Ill. App. 1, 98 N.E.2d 164 (1951) (dictum); Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, 116 N.E.2d 193 (1953).

51. Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937).

52. Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933); Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P.2d 930 (1938); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633 (1957); Cernes v. Pittsburg Coca Cola Bottling Co., 183 Kan. 758, 332 P.2d 258 (1958).

53. Le Blanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); Miller v. Louisiana Coca-Cola Bottling Co., 70 So. 2d 409 (La. Ct. App. 1954).

54. Michigan has for years talked of a "warranty" running with the product to the consumer, but has defined it to mean only a warranty that due care has been used. Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Smolenski v. Libby, McNeill & Libby, 280 Mich. 329, 273 N.W. 587 (1937); Ebers v. General Chem. Co., 310 Mich. 261, 17 N.W.2d 176 (1945). In the recent case of Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958), the court found a "warranty" from the maker of cinder building blocks—and apparently of other products, including food—to the consumer, even in the absence of negligence.

55. Jackson Coca Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Chenault v. Houston Coca Cola Bottling Co., 151 Miss. 366, 118 So. 177 (1928); Coca Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Bufkin v. Grisham, 157 Miss. 746 128 So. 563 (1930); Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932); Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939).

56. Madouros v. Kansas City Coca Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Nemela v. Coca-Cola Bottling Co., 104 S.W.2d 773 (Mo. Ct. App. 1937); McNicholas v. Continental Baking Co., 112 S.W.2d 849 (Mo. Ct. App. 1938); Carter v. St. Louis Dairy Co., 139 S.W.2d 1025 (Mo. Ct. App. 1940); Helms v. General Baking Co., 164 S.W.2d 150 (Mo. Ct. App. 1942); Foley v. Coca-Cola Bottling Co., 215 S.W.2d 314 (Mo. Ct. App. 1948).

57. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Tennebaum v. Pendergast, 90 N.E.2d 453 (Ohio C.P. 1949); Mahoney v. Shaker Square Beverages,

Texas,[61] Virginia,[62] and Washington.[63] In five other states, Connecticut,[64] Georgia,[65] Minnesota,[66] Montana,[67] and South Carolina,[68] the same result is reached under statutes, which either provide a warranty to the consumer, or are construed to make the sale of defective food for human consumption negligence per se, even though there is no privity and all possible care has been used. There are thus twenty-two in all.

Fourteen jurisdictions have rejected the strict liability, and continue to hold that the seller of food is not liable to the consumer in the absence of negligence or privity of contract. They are Alabama,[69] Arkansas,[70] the Dis-

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Inc., 102 N.E.2d 281 (Ohio C.P. 1951). Ohio has carried the rule beyond food. See notes 100-01 *infra*.

58. Griffin v. Asbury, 196 Okla. 484, 165 P.2d 822 (1945); see Southwest Ice & Dairy Prod. Co. v. Faulkenberry, 203 Okla. 279, 220 P.2d 257 (1950).

59. At first Pennsylvania relied on a pure food statute, regarded as declaratory of the common law. Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Nock v. Coca Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931). Later cases have ceased to rely on it. Bilk v. Abbotts Dairies, Inc., 147 Pa. Super. 39, 23 A.2d 342 (1941); Caskie v. Coca-Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953); see Bonker v. Ingersoll Prod. Corp., 132 F. Supp. 5 (D. Mass. 1955) (Pennsylvania law).

60. Coca-Cola Bottling Co. v. Negron Torres, 255 F.2d 149 (1st Cir. 1958); Ponce de Leon v. Coca Cola Bottling Co., 75 F. Supp. 966 (D.P.R. 1948).

61. Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); Coca-Cola Bottling Co. v. Smith, 97 S.W.2d 761 (Tex. Civ. Ct. App. 1936); Coca-Cola Bottling Co. v. Burgess, 195 S.W.2d 379 (Tex. Civ. Ct. App. 1946); Amarillo Coca-Cola Bottling Co. v. Loudder, 207 S.W.2d 632 (Tex. Civ. Ct. App. 1947); Sweeney v. Cain, 243 S.W.2d 874 (Tex. Civ. Ct. App. 1951); Campbell Soup Co. v. Ryan, 328 S.W.2d 821 (Tex. Civ. Ct. App. 1959).

62. Swift & Co. v. Wells, 110 S.E.2d 203 (Va. 1959).

63. Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P.2d 76 (1940); Geisness v. Scow Bay Packing Co., 16 Wash. 2d 1, 132 P.2d 740 (1942) (dictum); LaHue v. Coca Cola Bottling, Inc., 50 Wash. 2d 645, 314 P.2d 421 (1957); see Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

64. CONN. GEN. STAT. § 42-16 (1958) (A warranty to "all persons for whom such food or drink is intended").

65. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948); Donaldson v. Great Atl. & Pac. Tea Co., 186 Ga. 870, 199 S.E. 213 (1938).

66. Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N.W. 428 (1909).

67. Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939).

68. Culbertson v. Coca-Cola Bottling Co., 157 S.C. 352, 154 S.E. 424 (1930); Hollis v. Armour & Co., 190 S.C. 170, 2 S.E.2d 681 (1939); McKenzie v. Peoples Baking Co., 205 S.C. 149, 31 S.E.2d 154 (1944); Turner v. Wilson, 227 S.C. 95, 86 S.E.2d 867 (1955).

The Ohio statute has been given a similar effect. Drock v. Great Atl. & Pac. Tea Co., 61 Ohio App. 291, 22 N.E.2d 547 (1939); Troietto v. G. H. Hammond Co., 110 F.2d 135 (6th Cir. 1940); Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940). The Ohio courts have, however, in the main ceased to rely upon it, and have adopted instead the theory of a warranty running with the food.

69. Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); *cf.* Sterchi Bros. Stores, Inc. v. Castleberry, 28 Ala. App. 281, 182 So. 471 (1938) (sale of refrigerator). Cases in the intermediate courts have accepted strict liability, but apparently are not the present law. Alabama Coca-Cola Bottling Co. v. Ezzell, 22 Ala. App.

trict of Columbia,[71] Kentucky,[72] Maine,[73] Maryland,[74] Massachusetts,[75] New Hampshire,[76] New Jersey,[77] New York,[78] Rhode Island,[79] South Dakota,[80] Tennessee,[81] and Wisconsin.[82] There are two others, North Carolina[83] and

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210, 114 So. 278 (1927); *cf.* Dothan Chero-Cola Bottling Co. v. Weeks, 116 Ala. App. 639, 80 So. 734 (1918) (privity not required for action on warranty of due care).

70. Drury v. Armour & Co., 140 Ark. 371, 216 S.W. 40 (1919); Nelson v. Armour Packing Co., 76 Ark. 352, 90 S.W. 288 (1905); Great Atl. & Pac. Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S.W.2d 65 (1934).

71. Connecticut Pie Co. v. Lynch, 61 App. D.C. 81, 57 F.2d 447 (Ct. App. 1932); Hanback v. Dutch Baker Boy, Inc., 70 App. D.C. 398, 107 F.2d 203 (1939).

72. Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1930).

73. Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925).

74. Flaccomio v. Eysink, 129 Md. 367, 100 Atl. 510 (1916); Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943); Cloverland Farms Dairy, Inc. v. Ellin, 195 Md. 663, 75 A.2d 116 (1950); Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Atwell v. Pepsi-Cola Bottling Co., 152 A.2d 196 (Mun. App. D.C. 1959) (Maryland law).

75. Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916); Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922); Carlson v. Turner Centre System, 263 Mass. 339, 161 N.E. 245 (1928); Kennedy v. Brockelman Bros., 334 Mass. 225, 134 N.E.2d 747 (1956); Karger v. Armour & Co., 17 F. Supp. 484 (D. Mass. 1936).

76. Howson v. Foster Beef Co., 87 N.H. 200, 177 Atl. 656 (1935); Hazelton v. First Nat'l Stores, Inc., 88 N.H. 409, 190 Atl. 280 (1937); Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); Russell v. First Nat'l Stores, Inc., 96 N.H. 471, 79 A.2d 573 (1951).

77. Cassini v. Curtis Candy Co., 113 N.J.L. 91, 172 Atl. 519 (Sup. Ct. 1934); Brussels v. Grand Union Co., 14 N.J. Misc. 751, 187 Atl. 582 (Sup. Ct. 1936); Cornelius v. B. Filippone & Co., 119 N.J.L. 540, 197 Atl. 647 (Sup. Ct. 1938); Stave v. Giant Food Arcade, 125 N.J.L. 512, 16 A.2d 460 (Sup. Ct. 1940); Schlosser v. Goldberg, 123 N.J.L. 470, 9 A.2d 699 (Sup. Ct. 1939); Duncan v. Juman, 25 N.J. Super. 330, 96 A.2d 415 (App. Div. 1953).

78. Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); Redmond v. Borden's Farm Prods. Co., 245 N.Y. 512, 157 N.E. 838 (1927); Gimenez v. Great Atl. & Pac. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Bourcheix v. Willow Brook Dairy, Inc., 268 N.Y. 1, 196 N.E. 617 (1935). There are at least a dozen other cases in the inferior New York courts. See Note, 8 BUFFALO L. REV. 290 (1959).

Recently some of the lower courts have been trying to change the rule and apply strict liability. Welch v. Schiebelhuth, 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957); Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (Munic. Ct. 1958); Lardaro v. MBS Cigar Corp., 10 Misc. 2d 873, 177 N.Y.S.2d 6 (N.Y.C. Munic. Ct. 1957); Greenberg v. Lorenz, 12 Misc. 2d 883, 178 N.Y.S.2d 407 (App. Term 1958), *rev'd* 183 N.Y.S.2d 46 (App. Div. 1959).

79. Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929); Lombardi v. California Packing Sales Corp., 83 R.I. 51, 112 A.2d 701 (1955).

80. Whitethorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940).

81. Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S.W. 155 (1915); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942).

82. Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927); see Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952) (animal food).

83. After an initial dictum approving strict liability in Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916), the court rejected it in Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935); Enloe v. Charlotte Coca-Cola

West Virgina,[84] which probably are still to be listed as rejecting the rule, although they are somewhat doubtful.

In the remaining fourteen states, Alaska, Colorado, Delaware, Hawaii, Idaho, Indiana, Nebraska, Nevada, North Dakota, Oregon, Utah, Vermont and Wyoming, there appears to be no definite law. In many of them there are decisions [85] stating, as to other products, the general rule that a warranty does not extend beyond the person with whom the seller makes his contract; but there has been no consideration of whether there may or may not be a special and exceptional rule as to food.

Thus it appears that strict liability in food cases, without privity, is the present law of a clear majority of the jurisdictions which have any definite law. Surprising as this may be to those who have not followed the changes of the last few years, it becomes even more impressive when one looks at the minority decisions. In most of the jurisdictions which reject the strict liability the earliest decision came before 1930. No new state has rejected it since 1935, and since that year ten new ones have adopted it. A good many of the opinions in the minority group have recognized the trend, but have said that their law is established, and any change must be for the legislature.[86]

It needs no seer or soothsayer to conclude that the outer defenses of the fortress of strict liability are even now in process of being carried; that so marked a trend will inevitably continue; and that the law of the future is that of strict liability for food.

Beyond Food

While this battle was still in its inception, and the attackers had as yet made little progress, writers here and there began to direct their shafts at other parts of the wall, and to cry for an extension of the strict liability to products other than food. For a long time the battlements held firm against all the raiding parties; and until the nineteen fifties no major breach occurred. The wall is still stoutly defended; and most of the courts which accept strict liability without privity as to food still refuse to apply it to such things as

Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935); and Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941). However, in Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951), there is dictum which indicates that the court may be ready to change its position.

84. All that has been found is a dictum requiring privity in Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S.E.2d 785 (1939).

85. Typical are Barni v. Kutner, 45 Del. (6 Terry) 550, 76 A.2d 801 (Super. Ct. 1950) (used automobile); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931) (tractor); Abercrombie & Union Portland Cement Co., 35 Idaho 231, 205 Pac. 1118 (1922) (cement); Senter v. B. F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954) (express warranty of tire).

It should be mentioned that in Underhill v. Anciaux, 68 Nev. 69, 226 P.2d 794 (1951), the court apparently would have been willing to consider strict liability for food, but did not find it necessary to do so.

86. See, *e.g.*, Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955).

automobiles,[87] tires,[88] pumps,[89] insecticides,[90] antifreeze compounds,[91] electric blankets,[92] insulating materials,[93] lumber,[94] furnaces,[95] or a portable elevator.[96] It goes without saying, of course, that where the rule is rejected as to food, it is rejected as to everything else. Of late, however, there has been here and there a breach; the assault goes on apace, and as the nineteen sixties are upon us, it becomes evident that we are to witness a new onslaught, which may lead to the most desperate struggle of all.

It began harmlessly enough. The first cracks in the wall were small, and apparently insignificant, when the analogy of food was carried over to something reasonably resembling it. Thus Missouri [97] and a federal court in California [98] found strict liability, without privity, on the part of a seller of animal food, apparently on the bald theory that food is food. No breach, however, in a beleaguered wall is to be ignored. Kansas and Ohio promptly carried the extension a step further, to articles for intimate bodily use which was external rather than internal, such as a hair dye,[99] soap,[100] and a permanent

87. Fulton Bank v. Mathers, 183 Iowa 226, 166 N.W. 1050 (1918); Dennis v. Willys-Overland Motors, 111 F. Supp. 875 (W.D. Mo. 1953); Murphy v. Plymouth Motor Corp., 3 Wash. 2d 180, 100 P.2d 30 (1940); Smith v. Ford Motor Co., 327 S.W.2d 535 (Mo. Ct. App. 1959); Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956) (tractor).

88. Wessley v. Seiberling Rubber Co., 90 F. Supp. 709 (W.D. Mo. 1950); *cf.* H. M. Gleason & Co. v. International Harvester Co., 197 Va. 255, 88 S.E.2d 904 (1955) (wheel).

89. Jordan v. Worthington Pump & Machinery Co., 73 Ariz. 329, 241 P.2d 433 (1952).

90. Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. Ct. App. 1955).

91. Cochran v. McDonald, 23 Wash. 348, 161 P.2d 305 (1945); Jordon v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949).

92. Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953); *cf.* Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E.2d 299 (1957) (electric cooker); Steele v. Westinghouse Electric Corp., 107 Ohio App. 379, 159 N.E.2d 469 (1958) (electric milk cooler); Larson v. United States Rubber Co., 163 F. Supp. 327 (D. Mont. 1958) (rubber boots, Montana law).

94. Collum v. Pope & Talbot, 135 Cal. App. 2d 653, 288 P.2d 75 (Dist. Ct. App. 1955) (ceiling joist); *cf.* Alexander v. Inland Steel Co., 263 F.2d 314 (10th Cir. 1958) (steel subpurlins, Kansas law).

95. Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946); *cf.* Burgess v. Montgomery Ward & Co., 264 F.2d 495 (10th Cir. 1959) (ladder); Booth v. Scheer, 105 Kan. 643, 185 Pac. 898 (1919) (stallion); Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953) (glass jars).

96. Young v. Aeroil Prod. Co., 248 F.2d 185 (9th Cir. 1957) (California law).

97. Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959) (fish food).

98. McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954) (dog food). A dictum in Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953), would apply the strict liability to watermelon seed. On the other hand, Mississippi has twice refused to apply it to stock feed. Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1922); Royal Feed & Milling Co. v. Thorn, 142 Miss. 92, 107 So. 282 (1926).

99. Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954).

100. Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953), *rev'd on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954). A dictum in Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952), apparently would apply the strict liability to a detergent on the basis that the user must get it on her hands.

wave solution.[101] A federal court in Missouri, reversing its earlier position, has only lately added a cigarette.[102]

A lower court in Ohio [103] was the first to go beyond such articles for bodily use, and to hold the seller of a grinding wheel strictly liable to the user, without negligence or privity. The decision apparently was overruled by the supreme court;[104] but the case which overruled it has since been doubted in turn, with an intimation that it might be decided otherwise if the question should arise again.[105] What the law of Ohio may be at the moment it is difficult to say. Arkansas [106] has found strict liability on the part of the manufacturer of a crop-dusting compound, dangerous and likely to drift, on the basis of an abnormally dangerous activity, with a citation of *Rylands v. Fletcher*. Except to this extent, however, the prediction of the extension of strict liability to products of special danger, which has been made from time to time, has not been realized.

The last two years have brought no less than seven spectacular decisions, which appear to have thrown the limitation to food onto the ash pile, and to hold that the seller of any product who sells it in a condition dangerous for use is strictly liable to its ultimate user for injuries resulting from such use, although the seller has exercised all possible care, and the user has entered into no contractual relation with him. The first of these, *Spence v. Three Rivers Builders & Masonry Supply, Inc.*,[107] came, appropriately enough from the point of view of the defendant, from the pen of Justice Voelker of Michigan, the author of *Anatomy of a Murder*; and it imposed the strict liability upon the manufacturer of cinder building blocks, which by no possible stretch of the imagination were to be regarded as intended for bodily use, or as "inherently dangerous." This was promptly echoed in an intermediate court in Florida, where the same conclusion was reached as to an electric cable.[108] Next came Judge Phillips of the Tenth Circuit,[109] purporting to apply the laws of Kansas and Missouri, but in fact going considerably beyond anything yet

101. Markovich v. McKesson & Robbins, 106 Ohio App. 265, 149 N.E.2d 181 (1958), foreshadowed in Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

102. Ross v. Philip Morris Co., W.D. Mo., Oct. 22, 1959, No. 9494, *modifying the opinion in* 164 F. Supp. 683 (W.D. Mo. 1958). See Anderson, *Observations on the Law of Implied Warranty of Quality in Missouri: 1960*, 1960 WASH. U.L.Q. 71.

103. Di Vello v. Gardner Machine Co., 46 Ohio Op. 161, 102 N.E.2d 285 (Ct. App. 1951).

104. Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953) (electric blanket).

105. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

106. Chapman Chem. Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949).

107. 353 Mich. 120, 90 N.W.2d 873 (1958).

108. Continental Copper & Steel Industries v. E. C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. App. 1958).

109. B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959). Compare the rather casual dictum in Magee v. General Motors, 124 F. Supp. 606 (W.D. Pa. 1954), a case of an automobile with a defective steering gear: ". . . either upon the theory of breach of implied warranty of fitness for purpose and merchantability, or upon the basis of common law negligence."

decided in either state,[110] who arrived at the decision that there was strict liability to the ultimate user on the part of the seller of an automobile tire.

There was then a decision of a Pennsylvania superior court,[111] which seems rather sadly to have misconstrued the language of earlier cases,[112] but, however that may be, concluded that the manufacturer of a truck was strictly liable to the driver. Then came an opinion of an intermediate court in California,[113] almost immediately vacated,[114] which held the maker of a grinding wheel to strict liability to an employee of the buyer; and this in turn was accepted, as the controlling California law on the liability of an airplane manufacturer for the death of a passenger, by a federal court in New York,[115] which was apparently blissfully ignorant that it was relying upon a nonexistent opinion. Finally, there was a decision of the Supreme Court of Minnesota[116] in an express-warranty case, which by way of dictum displayed a desire to jettison entirely the requirement of privity for any warranty on any product, and seems to foreshadow strict liability to the consumer for virtually anything sold.

Seven such cases, in so short a time, may very well be said to amount to a Trend. It would be rather easy to find fault with several of these decisions, which have displayed much more in the way of enthusiasm for the result to be reached than of accuracy in the citation of precedent. But taken in the aggregate, they give the definite impression that the dam has busted, and those in the path of the avalanche would do well to make for the hills. And if the metaphor is mixed, it may still not be inappropriate to the situation.

Thus matters now stand. Again it needs no prophet to forsee that there will be other such decisions in the next few years, and that the storming of

110. See Booth v. Scheer, 105 Kan. 643, 185 Pac. 893 (1919); Dennis v. Willys-Overland Motors, 111 F. Supp. 875 (W.D. Mo. 1953); Wessley v. Seiberling Rubber Co., 90 F. Supp. 709 (W.D. Mo. 1950); Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958).

In Alexander v. Inland Steel Co., 263 F.2d 314, 319 (10th Cir. 1958), the Tenth Circuit itself concluded that "implied warranties, in the absence of privity, are restricted in Kansas to food and beverage products, glass containers of beverages, and hair dye."

111. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 569 (1959).

112. The court relied on Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949), which is a negligence case, and on three cases of express warranty, Conestoga Cigar Co. v. Finke, 144 Pa. 159, 22 Atl. 868 (1891); Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953); Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946). None of these appears to offer any support for the proposition that an implied warranty of a product other than food runs to one not in privity.

113. Peterson v. Lamb Rubber Co., 343 P.2d 261 (Cal. App. 1959).

114. The supreme court of California promptly granted a hearing in this case. Under the peculiar California procedure such a hearing is de novo. The opinion of the District Court of Appeals is vacated, and becomes as if never written. It is not officially reported, and in California it is considered a breach of etiquette for counsel even to refer to it. At the time of writing the hearing is still pending.

115. Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959). Since the text was written, this has been echoed in Middleton v. United Aircraft Corp., 6 Av. Cas. 17957 (S.D.N.Y. 1960).

116. Beck v. Spindler, 99 N.W.2d 670 (Minn. 1959).

the inner citadel is already in full cry. That there may also be legislation is indicated by a Georgia statute,[117] enacted in 1957, which provides that every manufacturer of any product sold as new shall warrant to the ultimate consumer that the article sold is merchantable and fit for the purpose.

Over this stricken field the slings and arrows of outrageous argument continue to fly.

THE ARGUMENTS

One may well ask at the outset, why is not liability for negligence enough? Why do the plaintiffs want strict liability; and have they any valid claim to it?

Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not. When a negligence action is brought against a manufacturer, the plaintiff is faced with two initial tasks. One is to prove that his injury has been caused by a defect in the product. The other is to prove that the defect existed when the product left the hands of the defendant. For neither of these is strict liability of any aid to him whatever. It cannot prove the causation;[118] and it cannot trace that cause to the defendant.[119] Once over these two hurdles, the plaintiff has a third task, to prove that the defect was there because of the defendant's negligence. This is by far the easiest of the three, and it is one in which the plaintiff almost never fails.

It is true that he has the burden of proof on the issue of negligence. It is true also that he seldom, if ever, has any direct evidence of what went on in the defendant's plant. But in every jurisdiction, he is aided by the doctrine of *res ipsa loquitur*,[120] or by its practical equivalent.[121] In all jurisdictions

117. GA. CODE ANN. § 96-307, discussed in Patterson, *Manufacturer's Statutory Warranty: Tort or Contract?* 10 MERCER L. REV. 272 (1959). The statute was held constitutional in Bookholt v. General Motors Corp., 215 Ga. 391, 110 S.E. 2d 642 (1959).

118. Geisness v. Scow Bay Packing Co., 16 Wash. 2d 1, 132 P.2d 740 (1942).

119. Williams v. Paducah Coca Cola Bottling Co., 343 Ill. App. 1, 98 N.E.2d 164 (1951); Tiffin v. Great Atl. & Pac. Tea Co., 20 Ill. App. 2d 421, 156 N.E.2d 249 (1959); Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 2d 175, 132 N.E.2d 442 (1956); Kruper v. Procter & Gamble Co., 160 Ohio St. 489, 117 N.E.2d 7 (1954), *reversing* 113 N.E.2d 605 (Ohio App. 1953); Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934).

120. Cases are legion. See for example Richenbacher v. California Packing Corp., 250 Mass. 198, 145 N.E. 281 (1924); Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833 (1938); Coca-Cola Bottling Co. v. Creech, 245 Ky. 414, 53 S.W.2d 745 (1932); Cassini v. Curtis Candy Co., 113 N.J.L. 91, 172 Atl. 519 (Sup. Ct. 1934); Gross v. Loft, Inc., 121 Conn. 394, 185 Atl. 80 (1936); Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 203 P.2d 522 (1949); De Lape v. Liggett & Myers Tobacco Co., 25 F. Supp. 1006 (D. Cal. 1939), *aff'd*, Liggett & Myers Tobacco Co. v. De Lape, 109 F.2d 598, (9th Cir. 1940); Coca-Cola Bottling Co. v. Davidson, 193 Ark. 825, 102 S.W.2d 833 (1937); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); Quinn v. Swift & Co., 20 F. Supp. 234 (M.D. Pa. 1937); Bissonnette v. National Biscuit Co., 100 F.2d 1003 (2d Cir. 1939); De Groat v. Ward Baking Co., 102 N.J.L. 188, 130 Atl. 540 (Ct. Err. & App. 1925).

121. Pennsylvania has a doctrine of "exclusive control," which has the same effect.

this at least gives rise to a permissible inference of the defendant's negligence, which gets the plaintiff to the jury. And in cases against manufacturers, once the cause of the harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown.

It is true that there have been occasional cases[122] in which the defect has been of such a character that it could not have been prevented by any ordinary care, and the application of *res ipsa* has been denied. But such cases are so extremely rare as to be almost negligible, and over many years very few of them have appeared in the books. It is also true that it is open to the defendant to rebut the inference of negligence by proof of his own due care. But, again with very rare exceptions,[123] the courts are agreed that such evidence does not entitle the defendant to a directed verdict, and raises only an issue for the jury.[124] And again it must be repeated, once the cause of the injury is proved to lie with the defendant, once it is brought home to his plant, the jury finds for the plaintiff. Why, then, do the plaintiffs and their cohorts clamor so loudly for strict liability of the manufacturer, and why are the defendants equally vociferous in their opposition?

Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953). Maine and South Carolina accomplish the same result under ordinary rules of circumstantial evidence. Lajoie v. Bilodeau, 148 Me. 359, 93 A.2d 719 (1953); Merchant v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949). Michigan, after denying for years that it accepted res ipsa loquitur, has at last admitted that it has been applying the doctrine all the time. Indiana Lumbermen's Mut. Ins. Co. v. Matthew Stores, Inc., 349 Mich. 441, 84 N.W.2d 755 (1957).

122. Sheffer v. Willoughby, 163 Ill. 518, 45 N.E. 253 (1896) (contaminated oysters); H. J. Heinz Co. v. Duke, 196 Ark. 180, 116 S.W.2d 1039 (1938); Crocker v. Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N.E. 1078 (1913); O'Brien v. Louis K. Liggett Co., 255 Mass. 553, 152 N.E. 57 (1926).

123. Nichols v. Continental Baking Co., 34 F.2d 141 (3d Cir. 1929); Swenson v. Purity Baking Co., 183 Minn. 289, 236 N.W. 310 (1931); Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); *cf.* Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E.2d 668 (1941) (contributory negligence).

Johnson v. Stoddard, 310 Mass. 232, 37 N.E.2d 505 (1941), a case of paratyphoid in cream puffs, appears to be unique in that the defendant was able to show the specific cause of the defect, a carrier not discovered until the plaintiff's illness was reported.

124. Coca-Cola Bottling Co. v. Massey, 193 Ark. 423, 100 S.W.2d 681 (1937); Heckel v. Ford Motor Co., 101 N.J.L. 385, 128 Atl. 242 (1925); De Lape v. Liggett & Meyers Tobacco Co., 25 F. Supp. 1006 (D. Cal. 1939), *aff'd*, 109 F.2d 598 (9th Cir. 1940); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S.W. 155 (1915); Richenbacher v. California Packing Corp., 250 Mass. 198, 145 N.E. 281 (1924); Bagre v. Daggett Chocolate Co., 126 Conn. 659, 13 A.2d 757 (1940); Coca-Cola Bottling Co. v. Davidson, 193 Ark. 825, 102 S.W.2d 833 (1937); Coca Cola Bottling Co. v. Creech, 245 Ky. 414, 53 S.W.2d 745 (1932); Doyle v. Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928); Broadway v. Grimes, 204 N.C. 623, 169 S.E. 194 (1933); Collins Baking Co. v. Savage, 227 Ala. 408, 150 So. 336 (1933); Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929); Webb v. Brown & Williamson Tobacco Co., 121 W. Va. 115, 2 S.E.2d 898 (1939); Try-Me Beverage Co. v. Harris, 217 Ala. 302, 116 So. 147 (1928).

No writer seems to have suggested that the answer lies in the preparation for trial, the negotiations for settlement, and the amount of the verdict. So long as the negligence issue remains in the case, it must be litigated, and plaintiff's counsel must be prepared to examine and to cross-examine witnesses, including even experts. He may even be forced to look up a little law, which is a thing from which some personal injury lawyers notoriously shrink. So long as there is the possibility that negligence may not be found, the defendant is encouraged by vain hopes, and the plaintiff gnawed by lingering doubts; and a case which *can* be decided for the defendant is worth less, in terms of settlement, than one which can not. And so long as the defendant can introduce evidence of his own due care, the possibility remains that it may influence the size of the verdict, as jurymen impressed with it stubbornly hold out for no liability, or a smaller sum.

All this, however, is but half of the picture. There are other sellers than the manufacturer of the product. It will pass through the hands of a whole line of other dealers, and the plaintiff may have good reason to sue any or all of them. The manufacturer is often beyond the jurisdiction.[125] He may even, in some cases, be unknown.[126] If he is identified and can be sued, it is very often impossible to pin the liability upon him. Even where there is a proved defect which speaks of obvious negligence on the part of some one, it may still not be possible to prove that it was on the part of the maker. The cracked Coca Cola bottle may have been cracked long after it left his plant.[127] And even

125. *Cf.* Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932), where the actual packer of canned corned beef was in Argentina, the first buyer a subsidiary corporation in Argentina, the primary distributor who put his name on the can in Illinois, and the retailer, the retail buyer and the injured consumer in Connecticut.

126. See Comarow v. Levy, 115 N.Y.S.2d 873 (Sup. Ct. 1952).

127. See Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942); Cunningham v. Parkersburg Coca-Cola Bottling Co., 137 W. Va. 827, 74 S.E.2d 409 (1953); Maybach v. Falstaff Brewing Corp., 359 Mo. 446, 222 S.W.2d 87 (1949); Miami Coca-Cola Bottling Co. v. Reisinger, 68 So. 2d 589 (Fla. 1953); Keffer v. Logan Coca-Cola Bottling Works, 141 W. Va. 839, 93 S.E.2d 225 (1956); Trust v. Arden Farms Co., 50 Cal. 2d 217, 324 P.2d 583 (1958); Smith v. Coca Cola Bottling Co., 97 N.H. 522, 92 A.2d 658 (1952); Hankins v. Coca Cola Bottling Co., 151 Tex. 303, 249 S.W.2d 1008 (1952); Jordan v. Coca Cola Bottling Co., 117 Utah 578, 218 P.2d 660 (1950); East Ky. Beverage Co. v. Stumbo, 313 Ky. 66, 230 S.W.2d 106 (1950).

Here the courts have displayed considerable liberality in accepting as sufficient circumstantial evidence of a rather scanty character, as to proper handling by all intermediate parties. See, *e.g.*, Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 203 P.2d 522 (1949); Coca-Cola Bottling Co. v. Hicks, 215 Ark. 803, 223 S.W.2d 762 (1949); Groves v. Florida Coca-Cola Bottling Co., 40 So. 2d 128 (Fla. 1949); Johnson v. Louisiana Coca-Cola Bottling Co., 63 So. 2d 459 (La. Ct. App. 1953); Poulos v. Coca-Cola Bottling Co., 322 Mass. 386, 77 N.E.2d 405 (1948); Joly v. Coca-Cola Bottling Co., 115 Vt. 174, 55 A.2d 181 (1947); Ryan v. Adam Scheidt Brewing Co., 197 F.2d 614 (3d Cir. 1952); Coca-Cola Bottling Works, Inc. v. Crow, 291 S.W.2d 589 (Tenn. 1956); Bornstein v. Metropolitan Bottling Co., 139 A.2d 404 (N.J. 1958); Zarling v. La Salle Coca-Cola Bottling Co., 2

when the cause can be fixed upon the manufacturer, he may turn out, in these days of chain stores and large supply houses, to be a small concern, operating on a shoestring, and financially the least responsible person in the whole chain of distribution.[128] If the plaintiff is to recover at all, he must often look to the wholesaler, the jobber, and the retailer.

It is here that negligence liability breaks down. The wholesaler, the jobber, and the retailer normally are simply not negligent. They are under no duty to test or inspect the chattel,[129] and they do not do so; and when, as is usually the case today, it comes to them in a sealed container, examination becomes impossible without destroying marketability. No inference of negligence can arise against these sellers, and *res ipsa loquitur* is of no use at all.

It is true that against the retailer, the consumer who buys for himself and is injured can rely, in all but a few states,[130] upon the old sales warranties of merchantable quality and fitness for the purpose.[131] But so long as the privity wall stands firm, these warranties are of no avail against the wholesaler;[132] nor

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Wis. 2d 596, 87 N.W.2d 263 (1958); Weggeman v. Seven-Up Bottling Co., 5 Wis. 2d 503, 93 N.W.2d 467 (1958).

Pennsylvania and Kansas have gone further, and in food cases have put the burden of proof upon the defendants, thus compelling them to fight it out with one another. Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953). It is worthy of note that both states apply strict liability to the sale of food.

128. See Note, 37 COLUM. L. REV. 77 (1937).

129. Kratz v. American Stores, 359 Pa. 335, 59 A.2d 138 (1948); Tourte v. Horton Mfg. Co., 108 Cal. App. 22, 290 Pac. 919 (Dist. Ct. App. 1930); Zesch v. Abrasive Co., 353 Mo. 558, 183 S.W.2d 140 (1944); Sears, Roebuck & Co. v. Marhenke, 121 F.2d 593 (9th Cir. 1941); Camden Fire Ins. Co. v. Peterman, 278 Mich. 615, 270 N.W. 807 (1937); Peaslee-Gaulbert Co. v. McMath's Adm'r, 148 Ky. 265, 146 S.W. 770 (1912); Isbell v. Biederman Furniture Co., 115 S.W.2d 46 (Mo. Ct. App. 1938); Belcher v. Goff Bros., 145 Va. 448, 134 S.E. 588 (1926); RESTATEMENT, TORTS § 402 (Supp. 1948).

130. Particularly where the product is in a sealed container. Kirkland v. Great Atl. & Pac. Tea Co., 233 Ala. 404, 171 So. 735 (1937); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Wilkes v. Memphis Grocery Co., 23 Tenn. App. 550, 134 S.W.2d 929 (1939); Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S.E. 610 (1936).

131. Gindraux v. Maurice Mercantile Co., 4 Cal. 2d 206, 47 P.2d 708 (1935); Sapiente v. Waltuch, 127 Conn. 224, 15 A.2d 417 (1940); Sloan v. F. W. Woolworth Co., 193 Ill. App. 620 (1915); Martin v. Great Atl. & Pac. Tea Co., 301 Ky. 429, 192 S.W.2d 201 (1946); Vieira v. Balsamo, 328 Mass. 37, 101 N.E.2d 371 (1951); Stave v. Giant Food Arcade, 125 N.J.L. 512, 16 A.2d 460 (Sup. Ct. 1940); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942); D'Onofrio v. First Nat'l Stores, Inc., 68 R.I. 144, 26 A.2d 758 (1942); Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939); Ryan v. Progressive Stores, 255 N.Y. 388, 175 N.E. 105 (1931). See Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

132. Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955); Flaccomio v. Eysink, 129 Md. 367, 100 Atl. 510 (1916); Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952); Cochran v. McDonald, 23 Wash. 2d 348, 161 P.2d 305 (1945); Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1937).

do they protect the buyer's wife or child,[133] his employee,[134] his guest,[135] his donee,[136] or his subpurchaser.[137] The result has been such utterly preposterous decisions as those holding that the wife who buys the sausage, handles it, cooks it, eats it, and is poisoned by it, cannot recover because she was merely buying as the agent of her husband, who was to pay the bill and so is regarded as the contracting party;[138] whereas the husband, who never saw the food, can recover on a warranty for the loss of her services.[139] The arrant folly of this has led to some remarkable legal gymnastics, in the form of contradictory presumptions or holdings as to agency,[140] and to specific provisions in the new Uniform

133. Sterchi Bros. Stores v. Castleberry, 28 Ala. App. 281, 182 So. 471 (1938); Pearl v. Wm. Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945); Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E.2d 299 (1957); Sears, Roebuck & Co. v. Marhenke, 121 F.2d 598 (9th Cir. 1941) (dictum); Conner v. Great Atl. & Pac. Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939); Hanback v. Dutch Baker Boy, Inc., 70 App. D.C. 398, 107 F.2d 203 (1939); Duncan v. Juman, 25 N.J. Super. 330, 96 A.2d 415 (App. Div. 1953); Borucki v. McKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938); Hopkins v. Amtorg Trading Corp., 265 App. Div. 278, 38 N.Y.S.2d 788 (1942); Salzano v. First Nat'l Stores, Inc., 268 App. Div. 993, 51 N.Y.S.2d 645 (1944); Massey v. Borden Co., 265 App. Div. 839, 37 N.Y.S.2d 571 (1942); Redmond v. Borden's Farm Prods. Co., 245 N.Y. 512, 157 N.E. 838 (1927); Binion v. Sasaki, 5 Cal. App. 2d 15, 41 P.2d 585 (Dist. Ct. App. 1935); Stave v. Giant Food Arcade, 125 N.J.L. 512, 16 A.2d 460 (Sup. Ct. 1940); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936); Schlosser v. Goldberg, 123 N.J.L. 470, 9 A.2d 699 (Sup. Ct. 1939) (husband).

134. Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (W.D. Ark. 1950); Collum v. Pope & Talbot, Inc., 135 Cal. App. 2d 653, 288 P.2d 75 (Dist. Ct. App. 1955); Duart v. Axton-Cross Co., 19 Conn. Sup. 188, 110 A.2d 647 (1954); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); Bourcheix v. Willow Brook Dairy, Inc., 268 N.Y. 1, 196 N.E. 617 (1935) (dictum).

135. Conner v. Great Atl. & Pac. Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939); Salzano v. First Nat'l Stores, Inc., 268 App. Div. 993, 51 N.Y.S.2d 522 (1944).

136. Burgess v. Montgomery Ward & Co., 264 F.2d 495 (10th Cir. 1959); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927); Brussels v. Grand Union Co., 14 N.J. Misc. 751, 187 A. 582 (Sup. Ct. 1936).

137 Del Gaudio v. Ingerson, 19 Conn. Sup. 151, 110 A.2d 626 (1954); Welshausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271 (1910).

138. Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916); Hazelton v. First Nat'l Stores, 88 N.H. 409, 190 Atl. 280 (1937); see Vaccaro v. Prudential Condensed Milk Co., 133 Misc. 556, 232 N.Y. Supp. 299 (1927).

139. Kennedy v. F. W. Woolworth Co., 205 App. Div. 648, 200 N.Y. Supp. 121 (1923) (loss of child's services); Jackson v. Watson & Sons, [1909] 2 K.B. 193. *But see* Gimenez v. Great Atl. & Pac. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934).

140. Thus where the wife is injured, she is found to be the principal, and the buyer. Gimenez v. Great Atl. & Pac. Tea Co., 264 N.Y. 390, 191 N.E. 27 (1934); Haller v. Rudmann, 249 App. Div. 831, 292 N.Y. Supp. 586 (1937); McSpedon v. Kunz, 245 App. Div. 824, 281 N.Y. Supp. 147 (1935). Where it is the husband who suffers injury, the wife is found to have bought as his agent. Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Visusil v. W. T. Grant Co., 253 App. Div. 736, 300 N.Y. Supp. 652 (1937); Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943).

Commercial Code and in a Connecticut statute,[141] which extend the retailer's warranty to all members of the buyer's household.

Such are the plaintiff's grievances, and such his claim to redress. When we come to the arguments adduced in support of his claim, we are confronted with more than a few which have a specious and unconvincing sound, and would appear to have been concocted in the heads of professors rather than based upon any realities of the situation. It is said, for example, that strict liability will provide a healthy and highly desirable incentive for producers to make their products safe. A skeptic may well question whether the callous manufacturer, who is unmoved by the prospect of negligence liability, plus *res ipsa loquitur*, and by the effect of any injury whatever upon the reputation of his goods,[142] will really be stimulated by the relatively slight increase in possible liability to take additional precautions against defects which cannot be prevented by only reasonable care.

It is said that it is the practice of reputable makers expressly to warrant their products, or to make good their deficiencies without such a warranty; and that the strict-liability rule merely enforces what the best companies already do. Undoubtedly the practice exists, on a large scale; but it is limited, on the part of almost every one, to replacement, repair, or return of the purchase price to make good the original bargain; and it does not extend to compensation for injuries to the person of the buyer, or his other property.[143] It is said, again, that the doctrine of *res ipsa loquitur* is applied, in many cases, to impose liability upon defendants who in reality have not been negligent at all; and that the strict liability merely formulates, as a general rule, what goes on all the time in fact. The hypothesis is very likely true, although it is not capable of proof, and the number of instances in which it has occured is probably far smaller than the proponents would have us believe; but the conclusion does not follow. One might as well say that because circumstantial evidence sometimes results in the conviction of the innocent, all criminal de-

141. UNIFORM COMMERCIAL CODE § 2-318 (1958 ed.); CONN. GEN. STAT. § 42-14 (1958), *amending* UNIFORM SALES ACT §§ 15(1), (2).

142. Furthermore, what is probably a more powerful incentive to make products as safe as possible lies in the desire of manufacturers to avoid the danger that their products will develop a reputation for being unsafe or defective and therefore be unacceptable to the purchasing public. Every manufacturing executive with whom the writer has discussed this matter regards it as a potential disaster when one of its products is found to be defective and the cause of an injury. The element which is most disturbing to manufacturers is not the potential judgment of legal liability but the injury which is done to the reputation of the product and its producer. While it may be conceivable that the imposition of strict liability could increase in some small measure the pressure upon a few backward manufacturers to make their products safe, it is doubtful that it will add very much to existing pressures.

Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945 (1957).

143. See Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930).

fendants should be found guilty; or that, because skid marks on the pavement may now and then permit the jury to find against defendants who in fact have exercised all due care, all automobile drivers should be held liable without fault.

Entitled to more respect is the "risk-spreading" argument, which maintains that the manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to do so, and through their prices to pass such losses on to the community at large. This contention has become identified with the concurring opinion of Justice Traynor of California in *Escola v. Coca Cola Bottling Co.*,[144] because of the following language:

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

Dean Pound [145] once denounced this as a piece of "authoritarian law," and a major step in the direction of socialism. Assuming that we are not nowadays disposed to flee shrieking in terror from the prospect of a spot of socialism in our law when the public interest demands it, the question remains whether our courts, our legislators, and public sentiment in general, are yet ready to adopt so sweeping a legal philosophy, and to impose so heavy a burden abruptly and all at once upon all producers. Thus far there has been relatively little indication that the time is yet ripe for what may very possibly be the law of fifty years ahead. As in the case of the related agitation for strict liability on the part of all automobile drivers, there are too many vested interests in the way, and the sudden change is likely to be regarded as too radical and disruptive;

144. 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

It is something of a misrepresentation to cite the opinion of Justice Traynor in the *Escola* case, as it has often been cited, without pointing out that although concurring, it was not concurred in; that six other justices did not agree with it, and no opinion of any other justice of the Supreme Court of California ever has agreed; and that it is not yet the law of California. Also that the passage quoted is only one small part of a lengthy opinion which states a good many other arguments for strict liability.

145. POUND, NEW PATHS OF THE LAW 39-47 (1950). In the intervening decade, Dean Pound has swung over to agree with Justice Traynor. Pound, *The Problem of the Exploding Bottle*, 40 B.U.L. REV. 167 (1960).

and progress in the direction of any such broad general rule cannot be expected to be rapid.

Dedicated writers have laid great stress upon liability insurance as the controlling and decisive factor in this situation. It seems very significant that, except for the casual reference in the lone opinion of Justice Traynor in the passage quoted above, no court, so far as can be discovered, ever has so much as mentioned insurance in a products-liability case. What insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance—and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes. Even the distribution of the losses through insurance may be a process that has its flaws. Until we develop, by analogy to workmen's compensation, a comprehensive system of compulsory insurance with rigidly limited damages—which no one as yet seems to have proposed specifically in this particular field [146]—there will always be uninsured defendants, there will always be liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers.[147] Liability

146. See, however, Feldman, *Liability of Manufacturers of Home Furnishings for Harm Done by the Product*, 1955 INS. L.J. 519, 560, suggesting legislation providing that a manufacturer who carries "full aid" accident insurance in statutory minimum amounts for the protection of consumers shall be relieved from his common law liability for negligence. This idea is borrowed from Professor Ehrenzweig.

147. The fact is, however, that most of our manufacturering industries are not monopolies in which the manufacturers can dictate price. In these industries prices are determined by a host of factors. The intensity of competition, the stage of the business cycle, the facility with which capital can move in and out of the industry, changes in public desires and tastes, and technological developments in the field are only a few of the variables constantly influencing price and causing price fluctuations. As a result of these economic factors it may often be a matter of pure chance as to whether a given manufacturer or industry can adjust its price structure to absorb a new cost thrust upon it. In the case of an individual, an increase may mean pricing himself out of the market. In the case of an industry a substantial general addition to price may have a devastating effect upon marginal producers. In some industries such additions may be substantial, for product liability costs are high. The representative of one manufacturer with whom the writer has discussed the general subject estimated that product liability cost for his company, even under the present system is about one and one-half million dollars a year.

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It is a common failing to overlook the problem of the small manufacturer. When social reformers speak of "manufacturers" they generally assume that all manufacturers are in the position of U.S. Steel Corporation or General Motors or Standard Oil Company of New Jersey. It may very well be (leaving out considerations of justice) that large organizations of this character can absorb or distribute an item of increased cost such as that which would result from the imposition of strict liability. But many manufacturers are in a totally different situation. Their position in the industry is vulnerable and their competitive situation delicate. It is

insurance is obviously not to be ignored; but it is a makeweight, and not the heart and soul of the problem.

No more impressive are some of the arguments advanced in behalf of the defendant. One is that strict liability will deter producers who seek to improve their products from adopting new methods. The short answer is that if they are not already deterred by existing liabilities, they are not likely to be. Another is that strict liability will expose the defendants to a deluge of false claims based upon fictitious defects and fake injuries. Undoubtedly there are, and will be, false claims, and it may be true that "the rats of Hamlin were as nought in comparison with that horde of mice which has sought refreshment within Coca-Cola bottles and died of a happy surfeit."[148] But the assumption apparently is that the fraudulent claimant, when he is inventing a defect in the product, will by choice invent one which does not indicate any negligence. This speaks for itself. It is also said that liability should *never* rest upon anything but fault, which is a position certainly out of date in this day and generation; and that only the legislature should make any such changes, which is the cry invariably raised against anything new whatever in the law.

All this aside, the arguments which have proved convincing to the courts which have accepted the strict liability are three:

1. The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.[149] This argument, which in the last analysis rests

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these comparatively small manufacturers who suffer when additional costs are added without regard to their situation.

Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947 (1957).

It is worthy of note that Dean Leon Green, who has been one of the most vigorous advocates of strict liability for automobile drivers, does not favor its extension to "mechanical products." Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 TENN. L. REV. 928, 933 (1957).

148. Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551, 566 (1941).

149. It is a well-known fact that articles of food are manufactured and placed in the channels of commerce, with the intention that they shall pass from hand to hand until they are finally used by some remote consumer. It is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption. Since it has been packed and placed on the market as a food for human consumption, and marked as such, the purchaser usually eats it or causes it to be served to his family without the precaution of having it analyzed by a technician to ascertain whether or not it is suitable for human consumption. In fact, in most instances the only satisfactory examination that could be made would be only at the time and place of the processing of the food.

upon public sentiment, has had its greatest force in the cases of food, where there was once popular outcry against an evil industry, and injuries and actions have multiplied, and public feeling is most obvious. It is now being advanced as to other products for bodily use, such as cosmetics. It suggests that as to still other products, distinctions may yet be drawn according to the probable danger, the frequency of injury, and what the public reasonably and rightfully expects.

2. The supplier, by placing the goods upon the market, represents to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything that he can to induce that belief. He intends and expects that the product will be purchased and used in reliance upon this assurance of safety; and it is in fact so purchased and used. The middleman is no more than conduit, a mere mechanical device, through whom the thing sold is to reach the ultimate user. The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he has made no contract with the consumer.[150]

3. It is already possible to enforce strict liability by resort to a series of actions, in which the retailer is first held liable on a warranty to his purchaser,

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It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health or life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.

Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942).

150. A party who processes a product and gives it the appearance of being suitable for human consumption, and places it in the channels of commerce, expects some one to consume the food in reliance upon its appearance that it is suitable for human consumption. He expects the appearance of suitableness to continue with the product until some one is induced to consume it as food. But a modern manufacturer or vendor does even more than this under modern practices. He not only processes the food and dresses it up so as to make it appear appetizing, but he uses the newspapers, magazines, billboards, and the radio to build up the psychology to buy and consume his products. The invitation extended by him is not only to the house wife to buy and serve his product, but to the members of the family and guests to eat it. In fact, the manufacturer's interest in the product is not terminated when he has sold it to the wholesaler. He must get it off the wholesaler's shelves before the wholesaler will buy a new supply. The same is not only true of the retailer, but of the house wife, for the house wife will not buy more until the family has consumed that which she has in her pantry. Thus the manufacturer or other vendor intends that this appearance of suitability of the article for human consumption should continue and be effective until some one is induced thereby to consume the goods. It would be but to acknowledge a weakness in the law to say that he could thus create a demand for his products by inducing a belief that they are suitable for human consumption, when, as a matter of fact, they are not, and reap the benefits of the public confidence thus created, and then avoid liability for the injuries caused thereby merely because there was no privity of contract between him and the one whom he induced to consume the food.

Id. at 619, 164 S.W.2d at 832-33.

and indemnity on a warranty is then sought successively from other suppliers, until the manufacturer finally pays the damages, with the added costs of repeated litigation.[151] This is an expensive, time-consuming, and wasteful process, and it may be interrupted by insolvency, lack of jurisdiction, disclaimers, or the statute of limitations, anywhere along the line. What is needed is a blanket rule which makes any supplier in the chain liable directly to the ultimate user, and so short-circuits the whole unwieldy process. This is in the interest, not only of the consumer, but of the courts, and even on occasion of the suppliers themselves.

"WARRANTY"

The early food cases suggested nothing very much in the way of a legal theory to support the strict liability, other than the obvious panacea of "public policy." As the decisions continued, there was an extended period during which courts proceeded to invent a remarkable variety of highly ingenious, and equally unconvincing, theories of fictitious agency, third-party-beneficiary contract, and the like, to get around the lack of privity between the plaintiff and the defendant. The unusual industry of Mr. Cornelius W. Gillam[152] has collected no less than twenty-nine such triumphs of juridical technique, and one cannot do better than to borrow them from him in a footnote, with appreciation.[153] Some of them still find occasional use in cases where the court is

151. See, *e.g.*, Tri-City Fur Foods, Inc. v. Ammerman, 7 Wis. 2d 149, 96 N.W.2d 495 (1959). In this connection, there is frequent mention of Kasler & Cohen v. Slavouski, [1928] 1 K.B. 78, where there was a series of five recoveries, and the manufacturer ultimately paid the consumer's damages, plus a much larger sum covering the heavy costs of the entire litigation.

152. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957).

153. The retailer is the consumer's agent to buy. Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1929).

The retailer is the manufacturer's agent to sell. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 482, 161 N.E. 557, 559 (1928).

The retailer assigns his warranty from the manufacturer to the consumer. Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936).

The consumer is a third party beneficiary of the retailer's contract with the manufacturer. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

The manufacturer's marketing of the goods is an offer to the consumer to warrant them if he will buy. Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391 (3d Cir. 1932).

The manufacturer makes a continuing unilateral offer to the consumer. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256.

The manufacturer's marketing of the goods is in itself a representation to the consumer that they are fit to buy. Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920).

The defendant is unable to overcome the inference of negligence from circumstantial evidence. Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

There is an irrebuttable presumption of negligence. Crigger v. Coca Cola Bottling Co., 132 Tenn. 545, 179 S.W. 155 (1915).

unwilling to state any broader rule of strict liability.[154] Out of all this welter,

A warranty "runs with the goods" from the manufacturer to the consumer. Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

The manufacturer's warranty to the retailer somehow "inures to the consumer's benefit." Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939).

A warranty runs with food contents from the manufacturer to the consumer, but does not run with the food container. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

Pure food statutes make the manufacturer a guarantor of his product to the consumer. Hunter v. Derby Foods, 110 F.2d 970 (2d Cir. 1940).

Warranty is hopelessly confused with negligence. Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924).

Food cases are a special exception to the privity rule, and a law unto themselves. Herzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

The privity rule is repudiated outright as contrary to public policy in food cases. Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948).

The privity rule is simply rejected without explanation. Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944).

The privity rule is simply ignored. Rainwater v. Hattiesburg Coca-Cola Bottling Co., 151 Miss. 315, 95 So. 444 (1923).

There is an implied warranty "created by implication of law independent of the contract." Flessher v. Carstens Packing Co., 93 Wash. 48, 52, 160 Pac. 14, 15 (1916).

Section 15(1) of the Uniform Sales Act abolishes the requirement of privity. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939).

Section 15(2) of the Uniform Sales Act includes the consumer as a "buyer." Note, 25 WASH. U.L.Q. 293 (1940); 42 HARV. L. REV. 414 (1929); see generally Note, 33 COLUM. L. REV. 868 (1933).

Section 15(2) of the Uniform Sales Act includes the manufacturer as a "seller." Note, 22 WASH. U.L.Q. 406 (1937).

Section 15(2) of the Uniform Sales Act somehow extends the implied warranty of fitness for the general purpose to the consumer. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 107 (1951).

Impleader sidesteps the privity requirement. Cohen v. Dugan Bros., Inc., 134 Misc. 155, 235 N.Y. Supp. 118 (Sup. Ct. 1929).

Notice and opportunity to defend make an adverse finding against the retailer binding upon the manufacturer, against whom the retailer has a claim over. Carleton v. Lombard, Ayers & Co., 149 N.Y. 137, 43 N.E. 422 (1896).

The manufacturer's advertising is an express warranty to the consumer. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

The manufacturer's advertising is a negligent misrepresentation to the consumer. Note, 22 WASH. U.L.Q. 406 (1937); Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y. Supp. 496 (1930).

The manufacturer's advertising is an unintentional deceit. Baxter v. Ford Motor Co., 175 Wash. 123, 35 P.2d 1090 (1934).

The manufacturer is estopped from denying that he has made representations to the consumer. Steensland, *Liability of the Manufacturer to the Ultimate Consumer Under Modern Merchandizing Practices*, 9 MONT. L. REV. 101, 107 (1948).

154. A late example is Freeman v. Navarre, 47 Wash. 2d 760, 289 P.2d 1015 (1955), where the retailer was held to be consumer's agent to buy pipe from the manufacturer. It is discussed in Gillam, *Judicial Legislation, Legal Fictions, and Products Liability: The Agency Theory*, 37 ORE. L. REV. 217 (1958).

the theory which finally emerged and won the day was that of an implied "warranty," either running with the goods to the consumer or made directly to him; and in the last decade warranty is virtually the only theory which has appeared in the decisions.

The adoption of this particular device was facilitated by the peculiar and uncertain nature and character of warranty, a freak hybrid born of the illicit intercourse of tort and contract. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort,[155] yet arising out of the warrantor's consent to be bound,[156] it later ceased necessarily to be consensual,[157] and at the same time came to lie mainly in contract."[158]

The action for breach of warranty was originally one on the case, sounding in tort and closely allied to deceit, from which it was not distinguished; and it was not until 1778[159] that the contract action was held to lie at all. It is undisputed that the original tort form of action, as on the case, still survives to the present day, and may everywhere be maintained.[160] Nor is this a mere technical matter of procedure, since there are many decisions which have held that the tort aspects of warranty permit the application of a tort rather than a contract rule, in such matters as the survival of actions,[161] the statute of limitations,[162] the measure of damages,[163] or recovery for wrongful

155. Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); 1 WILLISTON, SALES 368-369 (2d ed. 1924); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 377 (1906).

156. Originally the seller was bound only by express words of warranty. Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Exch. 1603).

157. Implied warranties of title were recognized first, and later warranties of quality were implied. Medina v. Stoughton, 1 Salk. 210, 1 Ld. Raym. 593, 91 Eng. Rep. 188 (K.B. 1700); Holcombe v. Hewson, 2 Camp. 391, 170 Eng. Rep. 1194 (K.B. 1810); Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (K.B. 1815); Jones v. Bright, 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829).

158. 42 HARV. L. REV. 414 (1929).

159. Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778). The practice had, however, apparently been adopted for some time, and was resorted to because of the procedural convenience of joining money counts in order to recover the price paid. See Williamson v. Allison, 2 East 446, 102 Eng. Rep. 439 (K.B. 1802).

160. Shippen v. Bowen, 122 U.S. 575 (1887); Arnold v. White, 153 Mich. 607, 117 N.W. 164 (1908); Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N.E. 481 (1908); Standard Paint Co. v. E. K. Vietor & Co., 120 Va. 595, 91 S.E. 752 (1917); Greenwood v. John R. Thompson Co., 213 Ill. App. 371 (1919); Wells v. Oldsmobile Co., 147 Ore. 687, 35 P.2d 232 (1934); Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938); McLachlan v. Wilmington Dry Goods Co., 41 Del. 378, 22 A.2d 851 (1941); Spillane v. Corey, 323 Mass. 673, 84 N.E.2d 5 (1940); Simone v. John J. Felin & Co., 35 Pa. D. & C. 645 (C.P. 1939); Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S.E.2d 785 (1939). See the discussion in Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953).

161. Gosling v. Nichols, 59 Cal. App. 2d 442, 139 P.2d 86 (1943); Bernstein v. Queens County Jockey Club, 222 App. Div. 191, 225 N.Y. Supp. 449 (1927).

162. Jones v. Boggs & Buhl, 355 Pa. 242, 49 A.2d 379 (1946); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (Dist. Ct. App. 1954); Finck v. Albers Super Market Co., 136 F.2d 191 (6th Cir. 1943). *Accord*, Schlick v. New York Dugan

death.[164] Beyond this, the old tort character has continued to color the substantive law of warranty itself, by perpetuating the idea of a misrepresentation of fact, however innocent, and of a liability arising and imposed by operation of law, which is quite independent of any intention to agree upon terms as a matter of fact.[165] Thus there are a great many cases, even between the immediate parties, in which to say that the warranty is a term of the contract is "to speak the language of pure fiction."[166]

The conclusion from all this is obvious. If warranty is a matter of tort as well as contract, and if it can arise without any intent to make it a matter of contract, then it should need no contract; and it may arise and exist between parties who have not dealt with one another. Notwithstanding this ready-to-hand logic, however, the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts in what they are trying to accomplish. Some of these difficulties are the following:

1. Although it was always possible to enforce a warranty by a tort form of action, there was no English or early American case in which the warranty itself was found to exist in the absence of a contract between the plaintiff and the defendant. This may very possibly have been due merely to the accidental fact that cases without contract simply did not arise. Nevertheless, once the contract action was established it came into such universal and almost exclusive use that, in the minds of nearly all courts and lawyers, warranty, whether express or implied, became definitely identified with the contract, and regarded as an integral and inseparable part of it. This attitude persists

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Bros., 175 Misc. 182, 22 N.Y.S.2d 238 (N.Y.C. City Ct. 1940), *overruled in* Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421. *Contra*, Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933).

163. See Amram & Goodman, *Some Problems in the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259 (1952). *Cf.* Medeiros v. Coca Cola Bottling Co., 57 Cal. App. 2d 707, 135 P.2d 676 (Dist. Ct. App. 1943).

164. Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938); Greenwood v. John R. Thompson Co., 213 Ill. App. 371 (1919); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Schuler v. Union News Co., 295 Mass. 350, 4 N.E.2d 465 (1936); B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959); Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959).

Other decisions have held to the contrary, on the ground that the gist of warranty has become contract. Wadleigh v. Howson, 88 N.H. 365, 189 Atl. 865 (1937); Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397 (1949); Whiteley v. Webb's City, Inc., 55 So. 2d 730 (Fla. 1951); Sterling Aluminum Prods., Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir. 1944). S. H. Kress & Co. v. Lindsey, 262 Fed. 331 (5th Cir. 1919).

165. Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); Hoe v. Sanborn, 21 N.Y. 552, 78 Am. Dec. 163 (1860); Lee v. Cohrt, 57 S.D. 387, 232 N.W. 900 (1930); Linn v. Radio Center Delicatessen, 169 Misc. 879, 9 N.Y.S.2d 110 (N.Y.C. Munic. Ct. 1939); Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N.W. 554 (1898); Hooven & Allison Co. v. Wirtz, 15 N.D. 477, 107 N.W. 1078 (1906).

166. Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 420 (1911). See also Smith, *Surviving Fictions*, 27 YALE L.J. 147, 317, 326 (1917).

to such an extent that the theory of warranty, far from being an aid to the recognition of strict liability to the consumer, has proved in many jurisdictions to be an actual deterrent; and in all probability this has considerably delayed any change in the law.

2. The same attitude may very possibly prevent the recovery of any damages which are not within the purview of breach of contract, such as those for wrongful death.[167]

3. Traditionally, warranty requires that the plaintiff shall act in reliance upon some representation or assurance, or some promise or undertaking, given to him by the defendant.[168] This is extraordinarily difficult, and may be quite impossible, to make out where, as is frequently the case, the consumer does not know who has made or sold the goods, and does not care. The husband or guest who eats a plate of beans seldom asks the housewife whose product they are, and still less often at what store she bought them. Even the purchaser at retail who eats the beans himself may be ignorant of the brand he buys, or utterly indifferent to it.[169] If the theory of warranty is to be applied as in ordinary sales cases, this may be a serious obstacle to recovery. Even yet there are still a few jurisdictions in which the supposed absence of reliance upon the retailer has prevented any recovery against him by a direct purchaser, when the goods are sold in a sealed container.[170]

4. Warranties on the sale of goods are governed in thirty-five states by the Uniform Sales Act,[171] a codification of the common-law rules, which was

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167. See cases cited note 164 *supra*.

168. See Noble v. Sears, Roebuck & Co., 12 F. Supp. 181 (W.D. Wash. 1935); Davis v. Williams, 50 Ga. App. 274, 198 S.E. 357 (1938); Great Atl. & Pac. Tea Co. v. Walker, 104 S.W.2d 627 (Tex. Civ. Ct. App. 1937); Walden v. Wheeler, 153 Ky. 181, 154 S.W. 1088 (1913); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); McMurray v. Vaughn's Seed Store, 117 Ohio St. 236, 157 N.E. 567 (1927).

169. Thus in Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952), the buyer of a bottle of liniment with an express warranty on the label was denied recovery against the manufacturer, because he paid no attention to it at the time of purchase. *Accord*, Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946); Sears, Roebuck & Co. v. Marhenke, 121 F.2d 598 (9th Cir. 1941); Torpey v. Red Owl Stores, Inc., 228 F. 2d 117 (8th Cir. 1955). Compare Senter v. B. F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954).

170. Kirkland v. Great Atl. & Pac. Tea Co., 233 Ala. 404, 171 So. 735 (1937); Postell v. Boykin Tool & Supply Co., 86 Ga. App. 400, 71 S.E.2d 783 (1952); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Wilkes v. Memphis Grocery Co., 23 Tenn. App. 550, 134 S.W.2d 929 (1939); Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S.E. 610 (1936).

See generally Waite, *Retail Responsibility and Judicial Lawmaking*, 34 MICH. L. REV. 494 (1936); Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939); Waite, *Retail Responsibility—A Reply*, 23 MINN. L. REV. 612 (1939); Leidy, *Another New Tort?* 38 MICH. L. REV. 964 (1940); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

171. 1 UNIFORM LAWS ANN. §§ 12-16 (1950).

promulgated in 1906 at a time when there was no such thing as a warranty to any third person. The definitions of "buyer" and "seller" in the act [172] were drawn with the immediate parties to the sale in mind, and it specifically provides that there are no implied warranties of quality except as set forth.[173] As a result the act has been held often enough to preclude any warranty to one who does not buy from the defendant.[174] The courts which seek to impose such a warranty must either ignore these provisions or construe them away.[175] The new Uniform Commercial Code,[176] which has replaced the Sales Act in a small number of states, extends the warranty only to the family, household or guest of the immediate buyer.

5. Furthermore, the implied warranties of the Sales Act are limited in their scope. The warranty of fitness for the purpose can arise only if the buyer makes his purpose known to the seller and relies upon the seller's skill or judgment. The warranty of merchantable quality arises only if the goods are bought by description from a seller who deals in goods of that description. If the buyer has examined the goods, there is no implied warranty as to defects which such examination ought to have revealed; and there is no warranty of fitness for any particular purpose on the sale of a specified article under

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172. "'Buyer' means a person who buys or agrees to buy goods or any legal successor in interest of such person. . . .

"'Seller' means a person who sells or agrees to sell goods, or any legal successor in the interest of such person." 1A UNIFORM LAWS ANN. § 76 (1950).

See also § 69(1), specifying the remedies of the "buyer" for breach of warranty as recoupment, action for damages, rejection, or rescission and recovery of the price paid from the seller.

173. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: . . .

1 UNIFORM LAWS ANN. § 15 (1950).

174. Hanback v. Dutch Baker Boy, Inc., 70 App. D.C. 398, 107 F.2d 203 (1939); Sneed v. Waite, 306 Ky. 587, 208 S.W.2d 749 (1948) (dictum); Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); *cf.* Hoback v. Coca Cola Bottling Works, 20 Tenn. App. 280, 98 S.W.2d 113 (1936).

175. See, *e.g.*, Klein v. Duchess Sandwich Co., 12 Cal. 2d 272, 93 P.2d 799 (1939); Jensen v. Berris, 31 Cal. App. 2d 537, 88 P.2d 220 (1939); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P.2d 76 (1940).

176. A seller's warranty whether express or implied extends to any natural person who is in the family or the household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

UNIFORM COMMERCIAL CODE § 2-318 (1958).

The comment of the Commissioners adds, however, that:

Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

its trade name.[177] If, as a good many courts have declared, it is these warranties which are to run with the goods to the consumer, then he must be denied recovery from, for example, the manufacturer, if the warranties do not arise on the initial sale to the wholesaler.[178] And if they do, anything which invalidates a contract of sale anywhere along the line may still defeat the recovery, as in the case of the Mississippi purchaser of a beverage on Sunday.[179]

6. Section 49 of the Sales Act further provides that the buyer cannot recover on a warranty unless he gives notice of its breach to the seller within a reasonable time after he knows, or ought to know, of the breach.[180] As between the immediate parties to the sale, this is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages.[181] As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom "steeped in the business practice which justifies the rule,"[182] and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings. This has given the courts a great deal of trouble; and in order to circumvent the statute they have been forced to resort to various devious methods—either holding that a long delay is "reasonable,"[183] or that the provision was

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177. (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

1 UNIFORM LAWS ANN. § 15 (1950).

178. *Cf.* Sears, Roebuck & Co. v. Marhenke, 121 F.2d 598 (9th Cir. 1941), denying recovery to a child injured by a hot water bag because its father, in purchasing from the retailer, did not disclose the "particular purpose."

179. Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925).

180. "But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." 1A UNIFORM LAWS ANN. § 49 (1950).

181. See American Mfg. Co. v. United States Shipping Board Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925) (Learned Hand, J.).

182. James, *Products Liability*, 34 TEXAS L. REV. 44, 192, 197 (1955).

183. Bonker v. Ingersoll Prods. Corp., 132 F. Supp. 5 (D. Mass. 1955); Whitfield v. Jessup, 31 Cal. 2d 826, 193 P.2d 1 (1948).

not intended to apply to personal injuries,[184] or that it is entirely inapplicable as between parties who have not dealt with one another.[185]

7. There is still another trap in Section 69 of the Sales Act, which says in effect that when the buyer has rescinded the sale to him, he cannot thereafter maintain an action for damages for breach of warranty.[186] This has meant, in Nebraska,[187] that a buyer who returned a defective pair of shoes and was given a new pair could not recover from the retailer for personal injury caused by the shoes. Other courts, however, have not agreed.[188]

8. Any liability founded upon a warranty is traditionally subject to disclaimer by the seller.[189] This means that he is free to insert in his contract of sale an effective agreement that he does not warrant at all,[190] or that he warrants only against certain consequences or defects,[191] or that his liability

184. Kennedy v. F. W. Woolworth Co., 205 App. Div. 648, 200 N.Y. Supp. 121 (1923); Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916 (1943).

Much the greater number of decisions have held to the contrary. Vogel v. Thrifty Drug Co., 43 Cal. 2d 184, 272 P.2d 1 (1954); Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P.2d 848 (1952); Whitfield v. Jessup, 31 Cal. 2d 826, 193 P.2d 1 (1948); DeLucia v. Coca-Cola Bottling Co., 139 Conn. 65, 89 A.2d 749 (1952); Idzykowski v. Jordan Marsh Co., 279 Mass. 163, 181 N.E. 172 (1932); Hazelton v. First Nat'l Stores, Inc., 88 N.H. 409, 190 Atl. 280 (1937); Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1945); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Timmins v. F. N. Joslin Co., 303 Mass. 540, 22 N.E.2d 76 (1939); Johnson v. Kanavos, 296 Mass. 373, 6 N.E.2d 434 (1937).

185. La Hue v. Coca-Cola Bottling, Inc., 50 Wash. 2d 645, 314 P.2d 421 (1957).

186. "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted." 1A UNIFORM LAWS ANN. § 69(2) (1950).

187. Henry v. Rudge & Guenzel Co., 118 Neb. 260, 224 N.W. 294 (1929); *accord*: Gerli v. Mistletoe Silks Mills, 80 N.J.L. 128, 76 Atl. 335 (Sup. Ct. 1910); Simmons v. Brooks, 66 A.2d 517 (D.C. Mun. App. 1949); Stanley Drug Co. v. Smith, Kline & French Labs., 313 Pa. 368, 170 Atl. 274 (1934); Boviard & Seyfang Mfg. Co. v. Maitland, 92 Ohio St. 201, 110 N.E. 749 (1915); Walter-Wallingford Coal Co. v. A. Himes Coal Co., 223 Mich. 576, 194 N.W. 493 (1923).

188. Russo v. Hochschild Kohn & Co., 184 Md. 462, 41 A.2d 600 (1945); Marko v. Sears, Roebuck & Co., 24 N.J. Super. 295, 94 A.2d 348 (App. Div. 1953).

189. James, *Products Liability*, 34 TEXAS L. REV. 44, 192, 210-12 (1955); Wilson, *Products Liability*, 43 CALIF. L. REV. 614, 809, 835-40 (1955); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 157-67 (1943).

190. Trayler Eng'r & Mfg. Co. v. National Container Corp., 45 Del. (6 Terry) 143, 70 A.2d 9 (Super. Ct. 1949); Gibson v. California Spray-Chem. Corp., 29 Wash. 2d 611, 188 P.2d 316 (1948); S. F. Bowser & Co. v. Independent Dye House, Inc., 276 Mass. 289, 177 N.E. 268 (1931); Rockwood & Co. v. Parrott & Co., 142 Ore. 261, 19 P.2d 423 (1933); Valley Refrigeration Co. v. Lange Co., 242 Wis. 466, 8 N.W.2d 294 (1943); Burntisland Shipbuilding Co. v. Barde Steel Products Corp., 278 Fed. 552 (D. Del. 1922); Morgan v. Williams, 46 Ga. App. 774, 169 S.E. 211 (1933); see also R. E. Brooks Co. v. Storr, 111 N.J.L. 316, 168 Atl. 382 (Ct. Err. & App. 1933) (evidence of warranties excluded by parol evidence rule); Kimball-Clark Co. v. Crosby, 175 Wis. 337, 185 N.W. 172 (1921).

191. Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N.D. 516, 101 N.W. 903 (1904) (warranted "only against breakage"); Minneapolis Threshing Mach. Co. v. Hocking,

shall be limited to particular remedies, such as replacement, repair or return of the price.[192] The courts have done what they could to obviate the dangerous power which this places in the hands of the seller, either by construing away the disclaimer,[193] or by finding that it was not brought home to the buyer,[194] or in an extreme case by refusing to enforce it as a matter of "natural justice and good morals."[195] Nevertheless, the very general use of disclaimers, and the sanction of the Sales Act,[196] make them a factor to be reckoned with; and

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54 N.D. 559, 209 N.W. 996 (1926); Kolodzcak v. Peerless Motor Co., 255 Mich. 47, 237 N.W. 41 (1931).

192. Sharples Separator Co. v. Domestic Elec. Refrigerator Corp., 61 F.2d 499 (3d Cir. 1932); Lee v. Pauly Motor Truck Co., 179 Wis. 139, 190 N.W. 819 (1922); Long v. Ideal Elec. & Mfg. Co., 120 Okla. 63, 250 Pac. 504 (1926); Helvetia Copper Co. v. Hart-Parr Co., 142 Minn. 74, 171 N.W. 272 (1919); Advance-Rumely Thresher Co. v. Wharton, 211 Iowa 264, 233 N.W. 673 (1930); Holden v. Advance-Rumely Thresher Co., 61 N.D. 584, 239 N.W. 479 (1931).

193. Disclaimer not applicable to total "breach of contract," or "failure of consideration:" Myers v. Land, 314 Ky. 514, 235 S.W.2d 988 (1951); International Harvester Co. v. Bean, 159 Ky. 842, 169 S.W. 549 (1914); Rocky Mountain Seed Co. v. Knorr, 92 Colo. 320, 20 P.2d 304 (1933); Smith v. Oscar H. Will & Co., 51 N.D. 357, 199 N.W. 861 (1924); Swift & Co. v. Aydlett, 192 N.C. 330, 135 S.E. 141 (1926); Lewitus v. Independent Fruit Auction Corp., 128 Misc. 384, 219 N.Y. Supp. 5 (App. Div. 1926).

Disclaimer applicable only to express warranties, not to implied: Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); Hooven & Allison Co. v. Wirtz Bros., 15 N.D. 477, 107 N.W. 1078 (1906); W. F. Main & Co. v. Dearing & Wallace, 73 Ark. 470, 84 S.W. 640 (1905); Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928); Lutz v. Hill-Diesel Engine Co., 255 Mich. 98, 237 N.W. 546 (1931); Liquid Carbonic Co. v. Coclin, 161 S.C. 40, 159 S.E. 461 (1931); Hughes v. National Equip. Corp., 216 Iowa 1000, 250 N.W. 154 (1933); McPeak v. Boker, 236 Minn. 420, 53 N.W.2d 130 (1952).

Disclaimer applicable only to personal injuries and not to property damage. Diamond Shale Co. v. Godwin, 112 S.E.2d 365 (Ga. App. 1959).

Disclaimer does not exclude obligation to deliver a merchantable article according to the description: W. F. Main & Co. v. El Dorado Dry Goods Co., 83 Ark. 15, 102 S.W. 681 (1907); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922); United Fig & Date Co. v. Falkenburg, 176 Wash. 122, 28 P.2d 287 (1934); Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); *cf.* Hall Furniture Co. v. Crane Breed Mfg. Co., 169 N.C. 41, 85 S.E. 35 (1915).

194. Not effective before contract was completed: Ward v. Valker, 44 N.D. 598, 176 N.W. 129 (1920); Edgar v. Joseph Breck & Sons Corp., 172 Mass. 581, 52 N.E. 1083 (1899); Amzi Godden Seed Co. v. Smith, 185 Ala. 296, 64 So. 100 (1913).

Fine print: Woodworth v. Rice Bros. Co., 110 Misc. 158, 179 N.Y. Supp. 722 (Sup. Ct.), *aff'd*, 193 App. Div. 971, 184 N.Y. Supp. 958 (1920); *cf.* Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 250 N.W. 713 (1933).

Obscure place: Black v. B. B. Kirkland Seed Co., 158 S.C. 112, 155 S.E. 268 (1930); Linn v. Radio Center Delicatessen, Inc., 169 Misc. 879, 9 N.Y.S.2d 110 (N.Y.C. Munic. Ct. 1939); Myers v. Land, 314 Ky. 514, 235 S.W.2d 988 (1950).

195. Linn v. Radio Center Delicatessen, 169 Misc. 879, 880, 9 N.Y.S.2d 110, 112 (N.Y.C. Munic. Ct. 1939) (food).

196. 1A UNIFORM LAWS ANN. § 71 (1950).

again, if the maker's warranty to the wholesaler fails, the consumer's recovery against the maker fails with it.

Commercially a disclaimer may not be at all an unreasonable thing, particularly where the seller does not know the quality of what he is selling and the buyer is willing to take his chances. Commercial buyers are usually quite able to protect themselves. It is another thing entirely to say that the consumer who buys at retail is to be bound by a disclaimer which he has never seen, and to which he would certainly not have agreed if he had known of it, but which defeats a duty imposed by the policy of the law for his protection. And if the opportunity is to remain open to the seller to frustrate that policy completely by the addition of such words as "Not Warranted in Any Way" to the label on the package, it may be expected that there will be those who will avail themselves of it. It may be predicted with some confidence that this will not be tolerated. There are still too few cases [197] which have dealt with the problem to permit any guess as to just what will be done about it; but at least it remains as a very obvious and a very large hole in the warranty theory.[198]

9. If, as has often been said, the warranty runs with the title to the goods, then it can protect no one who does not acquire the title; and the employee of the retailer,[199] or the friend of the housewife who cuts her hand in a helpful attempt to reseal a glass jar,[200] cannot recover. It may very well be that we are not yet ready, and may never be ready, to extend the strict liability to such people;[201] but if the time is to come when the courts are ready for it, they have laid up trouble in heaven.

What all of this adds up to is that "warranty," as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of undesirable complications, and is leading us down a very thorny path. The

197. See Jolly v. C. E. Blackwell & Co., 122 Wash. 620, 624, 211 Pac. 748, 750 (1922) ("since a specific warranty as to personal property cannot run with the thing itself, we see no reason why a disclaimer of warranty should run with the thing"); *cf.* Sokoloski v. Splann, 311 Mass. 203, 40 N.E.2d 874 (1942).

In Linn v. Radio Center Delicatessen, Inc., 169 Misc. 879, 9 N.Y.S.2d 110 (N.Y.C. Munic. Ct. 1939), the manufacturer's disclaimer on the sale of food was held to be ineffective against the consumer, as against natural justice and good morals. *Contra*, Rockwood & Co., v. Parrott & Co., 142 Ore. 261, 19 P.2d 423 (1933). In Champlin v. Oklahoma Furniture Mfg. Co., 269 F.2d 918 (10th Cir. 1959), and Ebers v. General Chem. Co., 310 Mich. 261, 17 N.W.2d 176 (1945), it was held that the disclaimer could not affect the manufacturer's liability to the consumer for negligence. See also American Hoist & Derrick Co. v. Frey, 127 La. 183, 53 So. 486 (1910).

198. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, 97-98 (1951), regards this as one of the greatest weaknesses of the warranty theory.

199. Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. Ct. App. 1943).

200. Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955); *accord*, Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949) (prospective purchaser handling bottle in self-service store); *cf.* Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946); Day v. Grand Union Co., 280 App. Div. 253, 113 N.Y.S.2d 436 (1952).

201. See text at note 261 *infra*.

courts which quote, in nearly every other case, the statement that "the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales,"[202] have proceeded to entangle themselves in precisely those intricacies like Laocoön and his sons.

All this is pernicious and entirely unnecessary. No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting"[203] that "warranty" can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, and respondeat superior. There is nothing so shocking about it today that cannot be accepted and stand on its own feet in this new and additional field, provided always that public sentiment, public demand, and "public policy" have reached the point where the change is called for. There are not lacking indications that some of the courts are about ready to throw away the crutch, and to admit what they are really doing, when they say that the warranty is not the one made on the original sale, and does not run with the goods, but is a new and independent one made directly to the consumer;[204] and that it does not arise out of or depend upon any contract, but is imposed by the law, in tort, as a matter of policy.[205]

Express Language

If the seller makes specific representations to the public concerning the quality of his wares, they may provide a different basis for strict liability to the consumer, which escapes the privity requirement.[206] The older cases,

202. Ketterer v. Armour & Co., 200 Fed. 322, 323 (S.D.N.Y. 1912).

203. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 Colum. L. Rev. 335, 358 (1924).

204. Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (dictum); Le Blanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959).

205. Jacob E. Decker & Sons, Inc., v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); La Hue v. Coca-Cola Bottling, Inc., 50 Wash. 2d 645, 314 P.2d 421 (1957); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954); Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947).

206. See Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 Mich. L. Rev. 1 (1938); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 Va. L. Rev. 134, 145, 157 (1937); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 Tenn. L. Rev. 963, 999-1009 (1957); Note, 46 Harv. L. Rev. 161 (1932); 81 U. Pa. L. Rev. 94 (1932); 18

in general, refused to accept any such idea,[207] although it was recognized that an intentional misrepresentation was a basis for an action of deceit,[208] and that a negligent one would support an ordinary negligence action for personal injuries.[209] As long ago as 1891, however, the Pennsylvania court,[210] relying upon the usages of trade, held that an express warranty on a tobacco tag inured to the benefit of a remote purchaser. The first major recognition of strict liability came, however, in 1934, when the Washington case of *Baxter v. Ford Motor Co.*[211] held that a statement, in the literature distributed by the maker of an automobile, that the glass in its windshield was "shatterproof" made it liable, without scienter or negligence, to one who bought the car from a dealer and was injured when a pebble struck the glass and shattered it.

This decision has been followed; and there are now some thirteen jurisdictions which have accepted the strict liability for statements that prove in fact to be false, when they are made to the public in labels on the goods themselves,[212] or in the seller's advertising[213] or his disseminated litera-

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CORNELL L.Q. 445 (1933); 22 WASH. U.L.Q. 406 (1937). In violent opposition to the whole matter is Leidy, *Another New Tort?* 38 MICH. L. REV. 964 (1940).

207. See, *e.g.*, Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922); Alpine v. Friend Bros., Inc., 244 Mass. 164, 138 N.E. 553 (1923).

208. Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1837).

209. Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y. Supp. 496 (1930); Lehner v. Procter & Gamble Mfg. Co., 206 Misc. 1103, 136 N.Y.S.2d 121 (N.Y.C. City Ct. 1954).

210. Conestoga Cigar Co. v. Finke, 144 Pa. St. 159, 22 Atl. 868 (1891).

211. 168 Wash. 456, 12 P.2d 409, *aff'd per curiam on rehearing*, 15 P.2d 1118 (1932), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934).

212. Conestoga Cigar Co. v. Finke, 144 Pa. St. 159, 22 Atl. 868 (1891) (tag on tobacco); Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 246, 130 S.W. 430 (1910) (ginger extract); Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931) (seed); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (insecticide); Free v. Sluss, 87 Cal. App. 2d 933, 197 P.2d 854 (Dist. Ct. App. 1948) (detergent); Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951) (dictum) (salt substitute); Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952) (dictum) (liniment); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (washing powder); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953) (watermelon seed); Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 272, 278 P.2d 723 (Dist. Ct. App. 1955) ("boned chicken"); Bonker v. Ingersoll Products Corp., 132 F. Supp. 5 (D. Mass. 1955) ("boneless chicken fricasee"; Pennsylvania law); Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (Dist. Ct. App. 1956) (mattress; plaintiff stabbed by a spring in her "gluteal prominence").

213. Laclede Steel Co. v. Silas Mason Co. 67 F. Supp. 751 (W.D. La. 1946) (scrap metal); Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 272, 278 P.2d 723 (Dist. Ct. App. 1955) ("boned chicken"); Maecherlein v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (Dist. Ct. App. 1956) (mattress); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (home permanent wave solution); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958) (same); Arfons v. E. I. Du Pont De Nemours & Co., 261 F.2d 434 (2d Cir. 1958) (dynamite; Ohio law).

ture,[214] and it can be found that the plaintiff relied upon such statements in making his purchase. Since the basis of this liability does not turn upon the character of the goods, but upon the representation, such decisions have not been confined to food, and have ranged over a variety of other commodities such as cosmetics, detergents, insecticides, automobiles, scrap metal, wire rope, dynamite, and a mattress.[215] After the *Baxter* case in 1934, decisions to the contrary have been amazingly few,[216] and this branch of the strict liability appears by now to be well established.

Its limitations are also fairly clear. There must be something which is reasonably to be understood as a positive assertion of fact, which covers the injurious defect.[217] The assertion must be made by the defendant,[218] and it must be addressed to the public,[219] or at least intended to be passed on to the particular plaintiff,[220] and he can recover only if he does in fact learn of

214. Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391 (3d Cir. 1932) (locomotive, with "guarantee" to be passed on to purchaser by the dealer); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118 (1934), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934) (glass in automobile windshield, catalogues); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) (safety of steel top of automobile, distributed literature); Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (dictum) (wire rope, manufacturer's manual); Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950) ("service policy" on automobile, distributed to purchasers); Arfons v. E. I. Du Pont De Nemours & Co., 261 F.2d 434 (2d Cir. 1958) (dynamite, Ohio law); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960) (brochure accompanying tire); *cf.* Ein v. Goodyear Tire & Rubber Co., 173 F. Supp. 497 (D. Ind. 1959) (tire, method not specified).

215. See cases cited in notes 212-14 *supra*.

216. The only two found are Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937), and Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938), both rejecting the *Baxter* case on similar facts. Jordon v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949), which denied recovery for labels on cans of anti-freeze solution, is overruled by Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

217. Thus "pure . . . and nutritious" was held not to cover a nail in a loaf of bread in Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922) and in Murphy v. Plymouth Motor Corp., 3 Wash. 2d 180, 100 P.2d 30 (1940), pictures of an automobile being turned over at sixty miles an hour and of a freight car resting on top of it, as well as descriptions of safety glass, were held to state nothing that was actually false. *Cf.* Alpine v. Friend Bros., 244 Mass. 164, 138 N.E. 553 (1923); Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952). Compare Jones v. Raney Chevrolet Co., 213 N.C. 775, 197 S.E. 757 (1938).

218. Thus the wholesaler was held not to have adopted the maker's warranty in Cochran v. McDonald, 23 Wash. 2d. 348, 161 P.2d 305 (1945).

219. Express warranties to individuals were held not to extend to third persons. Senter v. B. F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954); Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953); Hermanson v. Hermanson, 19 Conn. Supp. 479, 117 A.2d 840 (1954); Pearl v. William Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945); Barni v. Kutner, 45 Del. (6 Terry) 550, 76 A.2d 801 (Super. Ct. 1950); Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928) (warranty theory held to require privity). In all of these cases, however, the plaintiff never knew of the representation and did not rely upon it.

220. *Cf.* Jeffery v. Hanson, 39 Wash. 2d 855, 239 P.2d 346 (1952) (tractor); Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (1946) (vaporizer).

it, and is injured as a result of his reliance upon it.[221] The Washington court, which started the whole development, has just refused to apply the principle to permit recovery for pecuniary loss due to a defect in a truck which led to excessive consumption of gasoline and oil, and has said that it is limited to cases "where the thing causing the injury is of a noxious or dangerous kind."[222]

Here again the legal theory which has emerged in the cases is that of a "warranty," made directly to the consumer by means of the express representation. Again, however, "warranty" would appear to be no unmixed blessing. Nearly all of the difficulties and objections which plague the implied warranty[223] arise with equal force against the express. Again the liability must clearly be in tort and not in contract, and there is not only no need to borrow a contract term from the law of sales, but it is fraught with trouble when it is employed. In the second appeal in the *Baxter* case,[224] the court discarded the theory of warranty in favor of one of deceit, which was applied notwithstanding the innocence of the misrepresentation, and the absence of either scienter or negligence. This comes much closer to the basic idea of deception which underlies these decisions; and it is quite consistent with the rule which has developed in at least thirteen jurisdictions,[225] that deceit will

221. Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952); Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946); see cases cited in note 211 *supra*.

222. Dimoff v. Ernie Majer, Inc., 347 P.2d 1056 (Wash. 1960).

223. See text at notes 167-201 *supra*.

224. . . . since it was the duty of appellant to know that the representations made to purchasers were true. Otherwise it should not have made them. If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know they were false, or that he believed them to be true. . . . The court charged the jury that "there is no proof of fraud in this case." It has become almost axiomatic that false representations inducing a sale or contract constitute fraud in law.

Baxter v. Ford Motor Co., 179 Wash. 123, 128, 35 P.2d 1090, 1092 (1934).

225. Stein v. Treger, 182 F.2d 696 (D.C. Cir. 1950); Cartwright v. Braly, 218 Ala. 49, 117 So. 477 (1928) (dictum); Lanning v. Sprague, 71 Idaho 138, 227 P.2d 347 (1951) (dictum); Romine v. Thayer, 74 Ind. App. 536, 128 N.E. 456 (1920); Becker v. McKinnie, 106 Kan. 426, 186 Pac. 496 (1920); New England Foundation Co. v. Elliott A. Watrous, Inc., 306 Mass. 177, 27 N.E.2d 756 (1940); Essenburg v. Russell, 346 Mich. 319, 78 N.W.2d 136 (1956); Moulton v. Norton, 184 Minn. 343, 238 N.W. 686 (1931); Paul v. Cameron, 127 Neb. 510, 256 N.W. 11 (1934); Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954); Wilson v. Jones, 45 S.W.2d 572 (Tex. Comm. App. 1932); Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785 (1929); Jacquot v. Farmers' Straw Gas Producer Co., 140 Wash. 482, 249 Pac. 984 (1926).

There are cases in four other jurisdictions which look like this, although the law is not clear. Chitty v. Horne-Wilson, Inc., 92 Ga. App. 716, 89 S.E.2d 816 (1955); Tott v. Duggan, 199 Iowa 238, 200 N.W. 411 (1924); Horton v. Tyree, 104 W. Va. 230, 139 S.E. 737 (1927); First Nat'l Bank of Tigerton v. Hecht, 159 Wis. 113, 149 N.W. 703 (1914).

lie for an entirely innocent misrepresentation made in a sale, rental or exchange transaction. It may at least afford a convenient bolt-hole for any court that finds itself bottled up in the complications of warranty; and sooner or later the courts may be expected to recognize that, without any idea of contract, the liability is one in tort, for an innocent misrepresentation.

Thus stands the battle today. What, then, of the future? To what may we look forward in the next ten, twenty, or even fifty years?

WHAT PRODUCTS?

Express representations to the public may of course cover any product. In the absence of express language, it is thus far still true that "the emotional drive and appeal of the cases centers in the stomach."[226] It can scarcely be doubted, in the light of the current decisions,[227] that the fight over food products will speedily be won by the plaintiff. There remains, however, an astonishing little argument over whether the "warranty" of food includes the safety of the container in which it is sold. Cases in California,[228] Oklahoma,[229] and Texas [230] have held that it does not, while Florida,[230a] Kansas,[231] Louisiana,[232] and Ohio [233] have disagreed. This metaphysical distinction between the container and the contents can only be regarded as amazing. The two are sold by each seller, and received by the ultimate purchaser, as an integrated whole; and where the action is against the immediate seller, it is well settled that the warranty covers both.[234] One can only surmise that the courts which make the distinction have been disturbed by an uneasy uncertainty as to whether, despite the evidence, the plaintiff may not have tried to open the bottle by banging it on the radiator. Suppose that a bottle of Coca Cola explodes, and cuts the plaintiff's wrist—is recovery really to turn on whether the explosion is due to a flaw in the glass or to an overcharged beverage?[235]

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226. LLEWELLYN, CASES ON SALES 342 (1930).

227. See cases cited notes 47-68 *supra*.

228. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Gerber v. Faber, 54 Cal. App. 2d 674, 129 P.2d 485 (Dist. Ct. App. 1942).

229. Soter v. Griesedieck W. Brewery Co., 200 Okla. 302, 193 P.2d 575 (1948); McAlester Coca-Cola Bottling Co. v. Lynch, 280 P.2d 466 (Okla. 1955).

230. Anheuser-Busch, Inc. v. Butler, 180 S.W.2d 996 (Tex. Civ. Ct. App. 1944); Latham v. Coca-Cola Bottling Co., 175 S.W.2d 426 (Tex. Civ. Ct. App. 1943).

See also Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. Ct. App. 1943), and Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955), where the injury was not to a consumer.

230a. Canada Dry Bottling Co. v. Shaw, 118 So. 2d 840 (Fla. App. 1960).

231. Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953).

232. Johnson v. Louisiana Coca-Cola Bottling Co., 63 So. 2d 459, 463 (La. 1953).

233. Mahoney v. Shaker Square Beverages, Inc., 102 N.E.2d 281 (Ohio C.P. 1951).

234. Morelli v. Fitch, [1928] 2 K.B. 636; Geddling v. Marsh, [1920] 1 K.B. 668; Naumann v. Wehle Brewing Co., 127 Conn. 44, 15 A.2d 181 (1940); Mead v. Coca Cola Bottling Co., 329 Mass. 440, 108 N.E.2d 757 (1952); Poulos v. Coca Cola Bottling Co., 322 Mass. 386, 77 N.E.2d 405 (1948).

235. Yet this distinction appears actually to be suggested in McIntyre v. Kansas City Coca Cola Bottling Co., 85 F. Supp. 708 (W.D. Mo. 1949).

There are, surprisingly enough, no cases on drugs,[236] except for one very important one involving poliomyelitis vaccine which is now on its way up in California.[237] Drugs always have gone along with food,[238] and in general it is to be expected that well known and standardized pharmacopœia products, such as Epsom salts and aspirin, will continue to do so. It seems obvious, however, that there will be cases of new, experimental or uncertain drugs which will present special problems, and to which the courts may hesitate to apply any such broad rule. The extension of strict liability to other products for intimate bodily use, such as cosmetics, is already under way,[239] and the prediction may be ventured with some confidence that within the next few years it will reach clothing. "No sound distinction can probably be logically drawn between a noxious thing taken internally, and wearing apparel, containing a poisonous dye, meant to be worn next to the skin."[240]

When we come to other products, not intended for such bodily use, one may speculate that, notwithstanding the spectacular eruption of recent decisions,[241] expansion of the strict liability of the seller is likely to proceed more slowly. There is not the same emotional drive and public demand—it is still the glass in the loaf of bread and the cockroach in the bottle of beer that arouses the utmost popular indignation. Furthermore, the products themselves differ in many respects from food, and vary widely. In a thoughtful article,[242] Dean Green has pointed out that "mechanical products," of which the automobile is doubtless typical, are expected to be used over a period of years, rather than consumed once; that the user is likely to be more or less experienced, and so able to some extent to protect himself; that such products frequently are assembled, inspected, tested or serviced by intermediate dealers before they reach the consumer; and that "there is no such thing as a mechanical product safe for very long in the hands of some one who does not know how to use it." Also that the use made of the thing is largely a matter

236. Unless the salt substitute in Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951), is to be regarded as a drug.

237. Gottsdanker v. Cutter Laboratories, District Court of Appeal of California, First Appellate District, 1 Civil No. 18413 (1959). The case raises a number of interesting and difficult questions concerning strict liability, on which it would not be proper for the writer now to comment. The problem is discussed in Note, 65 YALE L.J. 262 (1955).

238. *E.g.*, Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852); Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118 (1889); *cf.* Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298 (1870).

239. See cases cited notes 99-102 *supra*. "Logic will permit no distinction in this regard between articles to be consumed by the human body internally and those to be absorbed by it externally. The law should be no less solicitous of the outside of man than of his inside." Higbee v. Giant Food Shopping Center, Inc., 106 F. Supp. 586, 587-88 (E.D. Va. 1952).

240. Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 520, 19 A.2d 502, 503 (1941).

241. See cases cited notes 107-16 *supra*.

242. Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928, 933 (1957).

of the plaintiff's own testimony, against which the defendant may be quite helpless.

There is the further objection, that a good many such products are still not far beyond the experimental stage, or may have defects that cannot be discovered or prevented by any methods as yet known to the producers. Professor Plant[243] calls attention to a Michigan case[244] in which the maker of an airplane incorporated in its engine a connecting rod made by another company, which was unduly subject to metal fatigue because of "inclusion pits" due to nonmetallic matter in the steel; and these pits could not be detected by the test prescribed by the Civil Aeronautics Administration, or by any other test of whose existence there was any evidence in the case. The courts may well be reluctant to saddle a still-developing industry with the heavy burden of responsibility for plane crashes due to such causes.

Nevertheless, an unbiased observer who has followed the whole sweep and progress of the law of the last half century will not conclude that strict liability is destined to stop short with articles for bodily use. The public interest in the safety of products which the public must buy certainly extends to a great many other things. The wedge has entered, and we are on our way. One may speculate that there will be initial slow expansion into two fields. One is that of high potential peril,[245] where products such as firearms and dynamite were classed, in the early days of negligence liability, as "inherently dangerous." The other involves what might be called standardized products, such as razor blades and automobile tires,[246] where there is uniformity of production methods and quality, and a high degree of safety already has been achieved, so that purchasers feel that they receive, and are entitled to receive, an assurance of such safety. Ultimately, after many such accretions, we may arrive at a "general rule" of strict liability for all products, with certain specified exceptions; but these things are still of the uncertain and indefinite future.

What Sellers?

In all of the cases in which strict liability has been accepted and applied, the defendant has been engaged in the business of selling goods of the particular kind. So far as can be discovered, the question has not even been raised as to whether the rule might apply to one who is not so engaged. One may predict with assurance that it will not. The housewife who sells a jar of jam to her neighbor, or the owner of a used car who trades it in to a dealer,

243. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

244. Livesley v. Continental Motors Corp., 331 Mich. 434, 49 N.W.2d 365 (1951).

245. *Cf.* Chapman Chem. Co. v. Taylor, 215 Ark. 650, 222 S.W.2d 820 (1949) (crop dusting chemical, likely to drift). *Contra*, Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (W.D. Ark. 1950) (dynamite).

246. It should be noted that the cases cited in notes 107-13 *supra*, all fall in this category.

will obviously stand on a very different footing so far as the justifiable expectations of third parties are concerned.

All of the courts which have accepted strict liability agree that it applies to the manufacturer of the product. There is also general agreement, except perhaps in two or three states,[247] that it applies to the retailer. There is, however, a somewhat baffling dispute as to the wholesaler. In Mississippi,[248] Missouri [249] and Texas,[250] it has been held that he is not liable on any "warranty" to the consumer. The opinions have endeavored to justify the conclusion by stressing the lack of privity, the wholesaler's inability to discover the defect, and the absence of any reliance upon his skill or judgment. There are decisions to the contrary in Kansas [251] and Washington,[252] and dicta in Florida [253] and North Carolina.[254]

Surely all of the valid arguments supporting strict liability—the public interest in the utmost safety of products, the demand for the maximum protection of the consumer, the implied assurance in placing the goods upon the market for human use, the consumer's reliance upon the apparent safety of a thing that he finds upon the market because the defendant has put it there, the fact that the consumer is the seller's ultimate objective, the desirability of avoiding circuity of action and allowing recovery directly against earlier sellers [255]—all of these apply with no less force against the wholesaler.

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247. Mississippi rejects the warranty on a direct sale to the plaintiff by the retailer. Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933). It also rejects the wholesaler's warranty. Elmore v. Grenada Grocery Co., 189 Miss. 370, 197 So. 761 (1940). It may be assumed that it rejects the retailer's warranty to a third party.

Missouri rejects the wholesaler's warranty. Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936). The federal court has taken this to mean that the retailer's warranty does not extend to third persons. See Conner v. Great Atl. & Pac. Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939); McIntyre v. Kansas City Coca Cola Bottling Co., 85 F. Supp. 708 (W.D. Mo. 1949) (dictum). But this conclusion in turn was rejected in Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948).

Virginia rejected the retailer's warranty to a third party in Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936). Doubt is cast upon the case, however, by Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959).

248. Elmore v. Grenada Grocery Co., 189 Miss. 370, 197 So. 761 (1940).

249. Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936).

250. Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952) (a 5-4 decision after rehearing); Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. Ct. App. 1943). See Comment, *Implied Warranties of Quality in Texas Sales*, 32 TEXAS L. REV. 557, 566-68 (1954); Note, 31 TEXAS L. REV. 594 (1953); Note, 10 WASH. & LEE L. REV. 255 (1953); Note, 1953 WASH. U.L.Q. 327.

251. Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P.2d 930 (1938); Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954).

252. Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P.2d 76 (1940).

253. See Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).

254. See Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951).

255. See text at notes 149-51 *supra*.

If the retailer is to be held to strict liability to one who never has heard his name, the wholesaler has no better claim to immunity. And when, as is now often the case, the large wholesale supply house is actually the prime mover in marketing the goods, and the manufacturer only a small concern which feeds it, there is no reason whatever to single out this one seller in the chain for an exception. These decisions would appear to be mere temporary aberrations, which in the long run will not be followed.

WHAT PLAINTIFFS?

No one has yet recovered for personal injuries, on the basis of strict liability without privity, who could not fairly be called a consumer. A customer in a beauty shop has recovered when her hair was treated with the defendant's dye,[256] and so has a housewife who contracted tularemia while preparing rabbits for cooking.[257] Members of the family of the final purchaser,[258] and his guests [259] and donees,[260] who consume or use the product have been protected. The case of his employee has not yet turned up, but there can be no doubt that he will be included. But others who have come in contact with the product and been injured by it, without consumption or use, have been denied recovery.[261]

Unquestionably the "emotional drive" and the public demand that has sprung from it have centered in the consumer. There may be no very logical reason why the seller should not assume strict responsibility to such casual bystanders, other than the fact that they are not the people whom he seeks to reach with his goods, and so they do not have the same reason to rely upon any implied assurance of safety. It may, however, be expected that any extension to the nonconsumer will be slow; and it may perhaps never come.

Strict liability also has been applied to permit the retailer to recover from

256. Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954).

257. Haut v. Kleene, 320 Ill. App. 273, 50 N.E.2d 855 (1943).

258. Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942) (husband recovers for injury to wife who was final purchaser); Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P.2d 930 (1938); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So.2d 313 (1944); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920).

259. Miller v. Louisiana Coca-Cola Bottling Co., 70 So.2d 409 (La. Ct. App. 1954); Welch v. Schiebelhuth, 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957).

260. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Nemela v. Coca-Cola Bottling Co., 104 S.W.2d 773 (Mo. Ct. App. 1937) (dictum); Blarjeske v. Thompson's Restaurant Co., 325 Ill. App. 189, 59 N.E.2d 320 (1945) (dictum).

261. Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. Ct. App. 1943) (retailer's employee); Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949) (shopper in self-service store); Torpey v. Red Owl Stores, 129 F. Supp. 404 (D. Minn. 1955) (friend resealing jar at request of purchaser).

the manufacturer for his pecuniary loss when indignant customers return the goods and spread the word.[262] This is, of course, not far removed from indemnity, and indicates again the policy of making each seller in the chain of distribution liable to all those whom, in ordinary course, the product is to reach.

WHAT DAMAGE?

All but a few of the cases have involved personal injuries; and the plaintiff has recovered for all of the usual elements of damage, including the physical consequences of mental disturbance.[263] Damage to property has been slow to appear, for the obvious reason that nearly all of the products thus far involved have been those intended for bodily use. There is no sensible reason for distinguishing between the two kinds of damage; and the question would appear to be rather one of choosing the products to be covered by the strict liability. If it is to be extended to include products likely to cause only property damage, cases of such damage may be expected to put in their appearance, and to be decided for the plaintiff. There are already four,[264] and they are supported, in principle at least, by the cases of recovery for pecuniary loss.[265]

A more difficult problem is that of what Professor Ehrenzweig has called "typicality" of the injury. Put in more ordinary language, this means the foreseeability of the harm—the seller's reasonable anticipation of it as a normal consequence of the consumption or use of his product if it should turn out to be defective. It is the sort of issue that is likely to be buried under the name of "proximate cause." There has been virtually no consideration of this problem[266] in the cases with which we are dealing, undoubtedly because food

262. Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913); Southwest Ice & Dairy Prods. Co. v. Faulkenberry, 203 Okla. 279, 220 P.2d 257 (1950). See note 265 *infra*.

263. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833 (1938).

264. In McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954), and Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959), recovery was allowed for the loss of dogs and fish respectively caused by defective animal food.

In Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958), the purchaser of cinder building blocks recovered from the manufacturer when he used them to build a house and it cracked.

In Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138 (5th Cir. 1959), *reversing* 163 F. Supp. 570 (E.D. Tex. 1958), a manufacturer of biscuits recovered for the loss of a batch of dough when the defendant's ice, used to mix it, turned out to be full of glass.

265. See cases cited note 252 *supra*. See also Continental Copper & Steel Indus., Inc. v. E. C. "Red" Cornelius, Inc., 104 So.2d 40 (Fla. Ct. App. 1958), where the plaintiff recovered for pecuniary loss on the purchase of a defective electric cable; and the dictum in Hoskins v. Jackson Grain Co., 63 So.2d 514 (Fla. 1953), as to the loss on a crop of watermelons. *Contra*, as to express language, Dimoff v. Ernie Majer, Inc., 347 P.2d 1056 (Wash. 1960).

266. Exceptions are Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946), where an express warranty of wire rope was held not to cover its use in a manner not to be

poisoning is such an obvious result of bad food. We are thrown back upon two reasonably close analogies: the direct warranty from the retailer to his purchaser, and the negligence action against the manufacturer. Both offer a good many cases.

It is clear initially that the seller is entitled to expect a normal use of his product, and that he is not to be held liable when it is mishandled [267] or used in some unusual and unforeseeable way,[268] as when nail polish is set on fire,[269] or cleaning fluid is splashed into the eye [270] or mixed with another chemical,[271] or an obstinate lady insists upon wearing shoes that do not fit.[272] It is generally agreed that the seller of pork infested with trichinae can at least expect the meat to be cooked,[273] although there are decisions which have allowed recovery when it was cooked to the extent that the plaintiff erroneously thought sufficient.[274]

Again, it is clear that the seller may expect, within some reasonable limits, that the product will be used by normal persons, and that he will not be held responsible when some idiosyncracy peculiar to the plaintiff makes him abnormally sensitive to a product quite harmless to ordinary people.[275] This must

expected, and Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952), as to allergy of the consumer.

267. Gilbride v. James Leffel & Co., 47 N.E.2d 1015 (Ohio Ct. App. 1942) (operation of a boiler); Walton v. Sherwin-Williams Co., 191 F.2d 277 (8th Cir. 1951) (crop dusting); Waterman v. Liederman, 16 Cal. App. 2d 483, 60 P.2d 881, *hearing denied*, 62 P.2d 142 (1936) (highly dangerous driving on tire); Hickert v. Wright, 182 Kan. 100, 319 P.2d 152 (1957) (same).

268. A normal use may, however, include such things as standing on a chair. Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (Dist. Ct. App. 1951); *cf.* Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P.2d 848 (1952) (wearing cocktail robe in proximity to kitchen stove); Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957) (lighting cigarette after use of ointment with inflammable vapor).

269. Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Mo. App. 1944); *accord*, Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2d Cir. 1954) (bathinette with supports of magnesium alloy exposed to temperature of 1100 degrees); Moore v. Jefferson Distilling & Denaturing Co., 169 La. 1156, 126 So. 691 (1930) (lighting match to look into oil drums); Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940) (dangerous method of controlling agricultural implement); Schfranek v. Benjamin Moore & Co., 54 F.2d 76 (S.D.N.Y. 1931) (stirring wall decorating compound with the finger); Dalton v. Pioneer Sand & Gravel Co., 37 Wash. 2d 946, 227 P.2d 173 (1951) (kneeling on wet ready-mix cement).

270. Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946).

271. Pabellon v. Grace Line, Inc., 94 F. Supp. 989 (S.D.N.Y. 1950).

272. Dubbs v. Zak Bros. Co., 38 Ohio App. 299, 175 N.E. 626 (1931).

273. Cheli v. Cudahy Bros. Co., 267 Mich. 690, 255 N.W. 414 (1934); Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943); Silverman v. Swift & Co., 141 Conn. 450, 107 A.2d 277 (1954); Eisenbach v. Gimbel Bros., Inc., 281 N.Y. 474, 24 N.E.2d 131 (1939); Feinstein v. Daniel Reeves, Inc., 14 F. Supp. 167 (S.D.N.Y. 1936); Zorger v. Hillman's, 287 Ill. App. 357, 4 N.E.2d 900 (1936).

274. McSpedon v. Kunz, 271 N.Y. 131, 2 N.E.2d 513 (1936); Holt v. Mann, 294 Mass. 21, 200 N.E. 403 (1936).

275. Frankes, Inc. v. Bennett, 201 Ark. 649, 146 S.W.2d 163 (1941); Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 801 (1942); Ross v. Porteous,

be qualified to the extent that he is required to take into account allergies common to a substantial portion of the population.[276] This in turn must be qualified by his reasonable right to assume that those who have a common allergy—for example, to strawberries—will be aware of the fact, and will take measures to protect themselves, so that a warning on the label may be all that is required of him.[277]

In other words, the problem is reduced to one of what the consumer has a right to expect, which is a product reasonably fit for the purposes for which it is sold; and strict liability should call for no different conclusion.

The same answer may very well be given as to the effect, in general, of an obvious defect or danger in the chattel, or of a latent one as to which the user is warned. Few products can ever be made entirely safe, and the producer cannot be made an insurer of every one who may possibly be hurt. The best meat will spoil if it is not refrigerated, and the finest automobile ever made is a thing of terrible danger if it is inexpertly driven or repaired. Machinery does not necessarily become utterly unfit for sale or use, and outlawed from the market, because its rollers are not guarded;[278] and when the use involves latent dangers, and proper directions and warnings are given,[279] the user ordinarily may reasonably be expected and required to comply with them.

Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939) (dictum); Graham v. Jordan Marsh Co., 319 Mass. 690, 67 N.E.2d 404 (1946); Karr v. Inecto, Inc., 247 N.Y. 360, 160 N.E. 398 (1928) (dictum); Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941); Walstrom Optical Co. v. Miller, 59 S.W.2d 895 (Tex. Civ. App. 1933); Bennett v. Pilot Products Co., 120 Utah 474, 235 P.2d 525 (1951); Zager v. F. W. Woolworth Co., 30 Cal. App. 2d 324, 86 P.2d 389 (Dist. Ct. App. 1939); Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956).

276. Gerkin v. Brown & Sehler Co., 177 Mich. 45, 61, 143 N.W. 48, 53 (1913); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697 (1939); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A.2d 73 (Ct. Err. & App. 1939); Taylor v. Newcomb Baking Co., 317 Mass. 609, 59 N.E.2d 293 (1945) (dictum); see Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363 (1941); Cull, *Allergy and the Law*, 12 Ins. Counsel J., July, 1945, p. 45; Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based Upon Breach of Implied Warranty of Quality*, 24 So. CAL. L. REV. 221 (1951); Comment, 49 MICH. L. REV. 253 (1950).

277. See Wright v. Carter Prods., 244 F.2d 53 (2d Cir. 1957); Braun v. Roux Distributing Co., 312 S.W.2d 758 (Mo. 1958); Noel, *The Duty To Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959); Dillard & Hart, *Products Liability: Directions for Use and the Duty To Warn*, 41 VA. L. REV. 145 (1955); DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 224-30 (1951).

278. See Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950); Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723 (1940); Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948); *cf.* Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S.W.2d 217 (1945); Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946).

279. Tingey v. E. F. Houghton & Co., 30 Cal. 2d 97, 179 P.2d 807 (1947); Richardson v. De Luca, 53 So. 2d 199 (La. Ct. App. 1951); Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926); Shaw v. Calgon, Inc., 35 N.J. Super. 319, 114 A.2d 278 (1955); Charles Lomori & Son v. Globe Lab., 35 Cal. App. 2d 248, 95 P.2d 173 (Dist. Ct. App. 1939).

It is only when the product is too dangerous to use at all,[280] or the warning may reasonably be expected to be inadequate,[281] that the maker becomes liable for negligence. Again there is nothing in the strict liability to call for any different rule.

Another question which has not been considered—perhaps because most of the goods have been sold in sealed containers—is the effect of misconduct of the intermediate dealer upon the strict liability of the manufacturer or wholesaler. Here again the negligence action offers some guide. It is well settled that the dealer's mere negligence, in failing to discover the defect,[282] or to take precautions against its existence,[283] will not relieve the maker of liability. On the other hand, where the dealer in fact discovers the danger,[284] or is notified of it,[285] and deliberately proceeds to pass the product along without warning, it is generally held that his responsibility supersedes that of the maker, who is no longer regarded as the "proximate cause" of the injury. There are, however, a few cases in which the product sold has been such an extremely dangerous one, and so utterly unfit for its intended use, that it has been held that the original seller was not relieved of liability even by such actual discovery.[286] Again the policy of protection of the public is evident, and such decisions are likely to be carried over into strict liability.

280. *Cf.* Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S.W. 570 (1925); Frazier v. Ayres, 20 So. 2d 754 (La. Ct. App. 1945); Clement v. Crosby & Co., 148 Mich. 293, 111 N.W. 745 (1907).

281. Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945) (inconspicuous); McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 75 S.E.2d 712 (1953) (instructions in pamphlet and on label conflicting); Karsteadt v. Philip Gross Hardware & Supply Co., 179 Wis. 110, 190 N.W. 844 (1922) (inadequate instructions to inexperienced user); J. C. Lewis Motor, Inc., v. Williams, 85 Ga. App. 538, 69 S.E.2d 816 (1952) (user knew tractor lacked exhaust deflector but did not appreciate dangers of carbon monoxide); Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y. Supp. 496 (1930) (sparks emitted by toy pistol, danger of igniting clothing).

282. Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Herman v. Markham Air Rifle Co., 258 Fed. 475 (E.D. Mich. 1918); Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951); Colvin v. John Powell & Co., 163 Neb. 112, 77 N.W.2d 900 (1956); Willey v. Fyrogas Co., 363 Mo. 406, 251 S.W.2d 635 (1952).

283. *Cf.* Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 102 N.W. 793 (1905); Moehlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N.W. 541 (1918); Farrell v. G. O. Miller Co., 147 Minn. 52, 179 N.W. 566 (1920).

284. Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P.2d 100 (1936); Catlin v. Union Oil Co., 31 Cal. App. 597, 161 Pac. 29 (Dist. Ct. App. 1916); Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S.W. 1047 (1911).

285. Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946); Trust Co. v. Lewis Auto Sales, Inc., 306 Ill. 132, 28 N.E.2d 300 (1940); Harper v. Remington Arms Co., 156 Misc. 53, 280 N.Y. Supp. 862 (Sup. Ct.), *aff'd*, 248 App. Div. 713, 290 N.Y. Supp. 130 (1936); E. I. Du Pont De Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954).

286. Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S.W. 570 (1925) (kerosene mixed with gasoline); Clement v. Crosby & Co., 148 Mich. 293, 111 N.W.

WHAT DEFENSES?

There has been very little consideration of the effect of the plaintiff's own unreasonable conduct as a defense. There are four decisions[287] in which the court has said flatly that his contributory negligence is no defense to an action founded on a "warranty" to the ultimate user. On the other hand, it has been said repeatedly, in actions upon a direct warranty to the injured purchaser, that contributory negligence will bar the action.[288] The confusion is merely part of the general murk which surrounds "warranty," and is another indication that that unhappy word is a source of trouble in this connection. If "warranty" is a matter of contract, or equally if it is one of strict liability in tort, how can contributory negligence be a defense when the action is not one for negligence?

When the cases are examined, however, they fall into a very consistent pattern, and it is only their language which is confusing. Those which refuse to allow the defense have been cases in which the plaintiff negligently failed to discover the defect in the product, or to guard against the possibility of its existence. They are entirely consistent with the general rule that such negli-

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745 (1907) (explosive stove polish); Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N.E. 639 (1930) (inflammable combs for heat treatment in beauty shop).

287. Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933) (poisonous flour; allegation of contributory negligence in pleading, details not stated, but quite unlikely that plaintiff discovered its character); Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P.2d 633 (1957) (failure to discover matches in beverage); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) (express warranty of unisteel top of car; negligent driving causing turnover); Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960) (driving on defective tire); *cf.* Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918) (direct warranty by restaurant; failure to discover pebbles in beans).

288. Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955) (continuing to use oil burner after notice that it was smoking); Hitchcock v. Hunt, 28 Conn. 343 (1859) (using barrels to store pork after discovery that they were leaking); Cedar Rapids & I.C. Ry. & Light Co. v. Sprague Electric Co., 203 Ill. App. 424, *aff'd*, 280 Ill. 386, 117 N.E. 461 (1917) (use of electric shovel after discovery of dangerous defects); Bruce v. Fiss, Doerr & Carroll Horse Co., 47 App. Div. 273, 62 N.Y. Supp. 96 (1900) (use of horse discovered to be dangerous); McCormick Harvesting Machine Co. v. Nicholson, 17 Pa. Super. 188 (1901) (use of rope after it had broken); Eisenbach v. Gimbel Bros., Inc., 281 N.Y. 474, 24 N.E.2d 131 (1939) (improper cooking of pork by experienced cooks); Bates v. Fish Bros. Wagon Co., 50 App. Div. 38, 63 N.Y. Supp. 649 (1900) (use of steam heating apparatus after discovery of defects); Tomita v. Johnson, 49 Idaho 643, 290 Pac. 395 (1930) (planting seeds after discovery they were the wrong kind); Pauls Valley Milling Co. v. Gabbert, 182 Okla. 500, 78 P.2d 685 (1938) (same); Topeka Mill & Elevator Co. v. Triplett, 168 Kan. 428, 213 P.2d 964 (1950) (dictum) (use of chicken feed known to be defective); Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E.2d 668 (1941) (eating biscuits made of lard smelling like carrion); Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952) (use of bags known to be defective); Finks v. Viking Refrigerators, Inc., 235 Mo. App. 699, 147 S.W.2d 124 (1941) (use of refrigerator meat showcase known to be defective); *cf.* Fredenhall v. Abraham & Straus, 279 N.Y. 146, 18 N.E.2d 11 (1938) (use of cleaning fluid in small unventilated bathroom after warning).

gence is not a defense in an action founded on strict liability.[289] Those which have permitted the defense all have been cases in which the plaintiff has discovered the defect and the danger, and has proceeded nevertheless to make use of the product. They represent the form of contributory negligence which consists of deliberately and unreasonably proceeding to encounter a known danger, and is quite often treated as assumption of risk. It is quite well settled that this is a defense against other actions based upon strict liability.[290] Again it appears probable that ordinary rules applicable to the tort action will be carried over.

CONCLUSION

The assault upon the citadel of privity is proceeding in these days apace.

289. Muller v. McKesson, 73 N.Y. 195, 29 Am. Rep. 123 (1878) (dog); Sandy v. Bushey, 124 Me. 320, 128 Atl. 513 (1925) (horse); Burke v. Fischer, 298 Ky. 157, 182 S.W.2d 638 (1944); Fake v. Addicks, 45 Minn. 37, 47 N.W. 450 (1890) (dictum); Wojewoda v. Rybarczyk, 246 Mich. 641, 225 N.W. 555 (1929); Stackpole v. Healy, 16 Mass. 33 (1819); Evins v. St. Louis & S.F.R.R., 104 Ark. 79, 147 S.W. 452 (1912); Bowman v. Humphrey, 132 Iowa 234, 109 N.W. 714 (1906); Niagara Oil Co. v. Ogle, 177 Ind. 292, 98 N.E. 60 (1912); Hoffman v. City of Bristol, 113 Conn. 386, 155 Atl. 499 (1931) (dictum).

290. Arthur v. Merchants' Ice & Cold Storage Co., 173 Cal. 646, 161 Pac. 121 (1916); Cooper v. Robert Portner Brewing Co., 112 Ga. 894, 38 S.E. 91 (1900); Armington v. Providence Ice Co., 33 R.I. 484, 82 Atl. 263 (1912); Bowles v. Indiana Ry. Co., 27 Ind. App. 672, 62 N.E. 94 (1901); Opelt v. Al G. Barnes Co., 41 Cal. App. 776, 183 Pac. 241 (1919); Ervin v. Woodruff, 119 App. Div. 603, 103 N.Y. Supp. 1051 (1907); Hosmer v. Carney, 228 N.Y. 73, 126 N.E. 650 (1920); Brown v. Barber, 26 Tenn. App. 534, 174 S.W.2d 298 (1943); Goodwin v. E. B. Nelson Grocery Co., 239 Mass. 232, 132 N.E. 51 (1921); Hughey v. Fergus County, 98 Mont. 98, 37 P.2d 1035 (1934); Heidemann v. Wheaton, 72 S.D. 375, 34 N.W.2d 492 (1948); Gomes v. Byrne, 51 Cal. 2d 418, 333 P.2d 754 (1959); Worth v. Dunn, 98 Conn. 51, 62, 118 Atl. 467, 471 (1922); Wells v. Knight, 32 R.I. 432, 80 Atl. 16 (1911).